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No. 07-541

IN THE

Supreme Court of the United States

ALEXANDRIA CITY SCHOOL BOARD,
PETITIONER

v.

A.K., A MINOR BY HIS PARENTS AND NEXT FRIENDS J.K. AND E.S.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Individuals with Disabilities Education Act, 20 U.S.C. §1414(d)(1)(A)(i)(VII) (2004) ("IDEA") demands that school districts offer an Individualized Education Program ("IEP") that not only describes the features of an educational program and the location of special education and therapy services within that program, but also lists a single, specific school site at which the program will be provided.

II. Whether a procedural defect in the preparation of a school district's proposed IEP, having no substantive effect on the provision of special education to a disabled student or the participation of his parents in the IEP process, nonetheless "as a matter of law" deprives the student of a "free appropriate public education" under IDEA, rendering the school district liable to reimburse parents for private school tuition which they pay after rejecting that IEP.

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The opinion of the administrative hearing officer rendering judgment for the School Board, dated September 25, 2004 is unofficially reported at 105 LRP 13597, and reproduced in the Appendix at App. 49a-80a.

The opinion of the U.S. District Court for the Eastern District of Virginia granting the School Board's motion for judgment on the administrative record, dated December 20, 2005, is officially reported at 409 F. Supp. 2d 689, and reproduced in the Appendix at App. 32a-45a.

The majority and dissenting opinions of a panel of the U.S. Court of Appeals for the Fourth Circuit, dated April 26, 2007 and reversing the decision of the U.S. District Court, are officially reported at 484 F.3d 672, and reproduced in the Appendix at App. 1a-31a.

The decision of the U.S. Court of Appeals for the Fourth Circuit denying the School Board's Petition for Rehearing or Rehearing En Banc, dated July 23, 2007, is unofficially reported at 2007 U.S. App. LEXIS 18249, and reproduced in the Appendix at App. 46a-47a. The dissent of Circuit Judge Roger L. Gregory from that Court's denial of the School Board's Petition for Rehearing, dated July 27, 2007, is unofficially reported at 2007 U.S. App. LEXIS 18249, and reproduced in the Appendix at App. 47a-48a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit sought to be reviewed was entered

on April 26, 2007. On May 10, 2007, the School Board timely filed a Petition for Rehearing or Rehearing En Banc in the U.S. Court of Appeals for the Fourth Circuit. The order of the U.S. Court of Appeals for the Fourth Circuit denying Petitioner's Petition for Rehearing or Rehearing En Banc was entered on July 23, 2007. This Petition is timely filed under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1(3) because it is being filed within 90 days of the denial of Petitioner's Petition for Rehearing in the court below. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The relevant statutory provisions involved concern the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400, *et seq.* (2004).[1] They include the section setting forth the content of an IEP, 20 U.S.C. § 1414(d)(1)(A), and specifically the term "location" as it is used in 20 U.S.C. §1414(d)(1)(A)(i)(VII); the definition of an "appropriate" education, 20 U.S.C. § 1401(9); and the provision concerning maintenance of educational "placement", 20 U.S.C. § 1415(j). These provisions are reproduced in the Appendix at App. 103a-106a.

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[1] Unless otherwise stated, all IDEA references are to the statute as amended in 2004. This is the version of the statute referenced in the decision of the Court of Appeals below.

STATEMENT

I. Factual Background

In this action, the parents of a special education student ("A.K." or the "Student") contended that the School Board had not proposed an IEP offering a "free appropriate public education" for their son for the 2004-2005 school year, as required by IDEA. They therefore sued the School Board pursuant to IDEA to recover tuition that they had paid instead to educate him for that school year at a private boarding school (Riverview School).

Before the 2004-2005 IEP process had begun, the Parents had already decided to continue for that school year their earlier private placement of A.K. at Riverview School, signing a contract on April 8, 2004 to do so. (JA 311; *see also* JA 876)[2]. Unaware of the Parents' decision, School Board staff undertook an extensive process to prepare a 2004-2005 IEP. A team including School Board special education staff, Parents and at times Riverview School staff met to develop an IEP on May 21, May 29 and June 9, 2004. (JA 100, 379-80, 610). The School Board's resulting proposed IEP reflected substantial input and collaboration with both the Parents and Riverview School staff. (JA 379). All parties agreed that it fully and accurately described A.K.'s present level of performance, and contained agreed goals and objectives in nine different areas of academic and social functioning. *Id.*

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[2] "JA" citations are to the Joint Appendix filed in the Court of Appeals.

The School Board's proposed IEP provided that educational placement for A.K. would be in a therapeutic "private day school" setting. (JA 379, 1103-04, 1108). As found by the District Court, and expressly agreed by the Court of Appeals, "'[p]rivate day school' placement is a term of art describing an educational program which includes several characteristics such as a small overall student body size, small classes, small facility, extensive clinical support, the ability to work individually with a student, extensive behavioral management, and parental involvement." App. 16a, n.1.

During the final IEP meeting, School Board staff suggested to the Parents two specific private day programs that could implement the IEP: Phillips School and Kellar School. (JA 620, 107). Both were therapeutic private day school programs in A.K.'s local community. School Board staff requested that the Parents consider both schools as private day placements for A.K. (JA 635). The Parents, however, immediately rejected both schools at the June 9, 2004 IEP meeting itself.[3]

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[3] A.K.'s mother testified that when they were suggested at the June 9, 2004 IEP meeting:

> Q Right. What did you say about Phillips School?
> A I think I said that I did not think they were appropriate.
> Q When the name of Kellar School was referenced in the 2004 -- the June 9, 2004 IEP, did you also say that you thought that was inappropriate?
> A I think so.

(JA 1186; *see also* JA 1103-1104; 1108-1109).

IDEA requires public school districts to consider and fund private day or residential schools in cases where a student's individual needs require that level of service. *Florence County School District v. Carter*, 510 U.S. 7, 15 (1993) (school district must either offer an appropriate public school program or fund an appropriate private program). By definition such private schools are not run or controlled by the school division. They require an application and interview process in order to admit a student. (JA 630). Accordingly, though the Parents had not agreed to the IEP, School Board staff nonetheless sent applications to several private day schools, including Phillips and Kellar, in order to ensure that they had space to accept him and implement his proposed 2004-2005 IEP in the event that the Parents accepted it. (JA 152; JA 629-630; Administrative Record 16). Without waiting for the outcome of the referral or interview process, however – and consistent with their rejection of Phillips and Kellar Schools at the June 9, 2004 IEP meeting – Parents on July 2, 2004 rejected outright the School Board's proposed IEP. (JA 379).

In the meantime, in response to the School Board's referrals, Phillips and Kellar Schools let the Parents know that they appeared to have an appropriate program for A.K., and invited him and his Parents to visit in order to confirm that. (JA 630-631; JA 155, 156). The Parents, however, did not make A.K. available for any interviews. (JA 156). Instead, without engaging in that interview process, on July 9, 2005, the Parents filed for an administrative hearing under IDEA, rejecting the School Board's proposal for private day school placement without allowing the School Board the possibility of offering one specific school since they

refused to participate in the requested interviews. (JA 1274-75).

By letter of August 6, 2004, School Board staff again asked the Parents to cooperate with the interview process. (JA 156). The letter reiterated the availability of two appropriate schools, Phillips and Kellar, and indicated that interviews still needed to occur in order to finalize admission. *Id.* The Parents still did not make the Student available for interviews, and did not otherwise respond to the letter. Indeed, the Parents did not at any point bring A.K. for necessary interviews to either the Phillips or Kellar Schools. (JA 631-632; JA 1191; *see also*, JA 156). Instead, they returned him to Riverview School, where he spent the the 2004-2005 school year.

II. Procedural History

In response to the Parents' July 9, 2004 request for an IDEA due process hearing, a three-day administrative evidentiary proceeding was held on September 13, 14 and 16, 2004. The Parents' claim was that the School Board's proposed IEP was substantively and procedurally inappropriate under IDEA, and that the School Board should therefore be required to fund the Student's residential placement at Riverview School.

In his September 25, 2004 decision, the administrative Hearing Officer determined that, "Both the federal regulations (34 C.F.R. 300.347) and the Virginia regulations (8 VAC 20-80-62 F) set forth the requirements for the contents of an IEP. The IEP prepared for AK by his IEP team for the 2004-2005

school year adequately fulfills these requirements." App. 76a-77a. With respect to identification of a single, specific school, the Hearing Officer stated:

> The private day placement envisioned by [ ] for [ ] was in a small, structured setting which would provide academic and related supplemental services such as counseling and therapy, This placement would assist [ ] in his transition into the local community, and constitute the least restrictive environment for him. The fact that [ ] did not specify a particular private day program suggests to me that [ ] wanted to give the parents as much flexibility as possible on this issue. Several private day possibilities were suggested, and the parents given the option of choosing the one which was most attractive to them. The fact that they found none of the possibilities attractive does not mean that the approach was not in accordance with the FAPE mandates. Thus I conclude that private day placement does provide FAPE.

App. 79a. Accordingly the Hearing Officer denied the Parents' claim for reimbursement of Riverview School. App. 79a-80a.

On March 1, 2005, the Parents filed an action in U.S. District Court for the Eastern District of Virginia pursuant to 20 U.S.C. § 1415(i)(2) for review of the Hearing Officer decision. On cross-motions for judgment on the administrative record, the District Court upheld the Hearing Officer's decision. App. 45a. The Court rejected the argument that the Student was denied a free appropriate public education ("FAPE")

because the School Board did not identify one specific proposed private school in the IEP itself. Relying upon authority from both the Fourth Circuit and other circuits, the District Court held that, "a recommendation for a child's educational placement means a recommendation to the actual educational program and not the particular institution where the program is implemented." App. 40a. The Court further held that the School Board complied with this requirement by offering a "private day school" placement in the IEP. App. 40a. Finally, the District Court closely examined the substance of the Phillips and Kellar programs, and determined that both were substantively appropriate for the Student. App. 43a-44a.

The Parents appealed the District Court decision to the U.S. Court of Appeals for the Fourth Circuit. By a 2-to-1 vote, a Panel of the Court of Appeals on April 26, 2007 reversed the District Court and Hearing Officer. The Panel accepted the District Court's finding that, "'[p]rivate day school' placement is a term of art describing an educational program which includes several characteristics such as a small overall student body size, small classes, small facility, extensive clinical support, the ability to work individually with a student, extensive behavioral management, and parental involvement." App. 16a, n.1. The Panel nonetheless held that as a matter of law, IDEA requires IEPs to include not merely the type of educational placement, but the name of the individual school where the IEP would be implemented.

The Panel majority further held that because the School Board had not included the name of a specific

school on the IEP, it had substantively denied the Student an appropriate education. App. 13a, 15a. The Panel majority conceded that the Parents knew that the School Board had offered two specific facilities – Phillips and Kellar Schools – but nonetheless held that, "***as a matter of law*** *that because it* [i.e. the IEP] *failed to identify a particular school, the IEP was not reasonably calculated to enable A.K. to receive educational benefits.*" App. 13a. (emphasis added).

Circuit Judge Roger Gregory dissented from the Panel's decision and its reversal of the Hearing Officer and District Court, on the ground that any failure to write a specific school on the IEP itself was harmless procedural error. App. 20a, 28a-29a. He observed:

> Whether or not there was extensive discussion of the schools during the meeting, Susan Sullivan named the schools as possible locations at which A.K. might be educated. In A.K.'s case, this oral notice was equivalent to the written notice the IDEA requires: after Sullivan's suggestions were made, A.K.'s parents knew with a reasonable degree of certainty where ACPS proposed to educate their child the following school year. The Phillips and Kellar schools were the only ones named as possibilities by ACPS until the school district sent A.K.'s information to several other private day schools on July 6, and during the IEP meeting, A.K.'s parents understood them as such.

App. 23a-24a. He further observed:

> Both Phillips and Kellar requested interviews with A.K. during the summer in order to determine conclusively whether they could give him the assistance he required, but A.K.'s parents never brought him home to attend those interviews. A.K.'s mother testified that when the Phillips and Kellar schools were named as potential locations in the June 9 IEP meeting, she already had determined that both schools were inappropriate for her son. She understood those schools were suggested locations; she simply disagreed with their selection. It is difficult to understand how A.K. could have lost educational opportunity on account of the omission of the schools' names from his IEP when his parents understood both schools were under consideration and had already expressed that neither was appropriate for their son.

App. 26a. Thus the dissent concluded that, "Because A.K.'s parents were given notice that the Phillips and Kellar schools were locations under consideration, ACPS's failure to write this information on his IEP did not deny A.K. an educational opportunity." App. 25a. Finally, the dissent highlighted an important fact expressly found by the District Court, and not addressed or challenged in the majority Panel opinion: Substantively, both the Phillips and Kellar School programs would have provided an appropriate, educationally beneficial program for the Student. App. 28a.

The School Board timely petitioned the U.S. Court of Appeals for the Fourth Circuit for rehearing, or rehearing en banc, of the Panel decision. By order

dated July 23, 2007, the Court denied that petition. App. 46a-47a. Circuit Judge Gregory dissented from the Court's decision not to grant rehearing. He stated:

> Under our present jurisprudence, public school districts are vulnerable to those who could use the unclear state of the law to their advantage. In particular I worry that public schools could be liable for large sums because of errors that, as here, have no adverse impact on the quality of the educational program made available to the student. Regrettably, our public schools today face greater social challenges than before with ever shrinking financial resources; and we should be careful not to expose them to a greater burden than Congress intended them to bear.
>
> The IDEA was written to ensure the fair treatment of disabled students by the educational system, a noble goal that is worthy of our vigilance, but not to punish a school district's good faith efforts to comply with the statute, even if those efforts sometimes entail technical but harmless errors.

App. 48a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision that an IEP must not only describe the features of the special education program, but include the name of a specific school is not one applicable only to a narrow subset of cases under IDEA. Rather, inasmuch as it construes the statutory definition of "Individualized Education Program", it is

applicable literally to every special education student covered by IDEA. The decision here conflicts with the consistent regulatory guidance of the U.S. Department of Education, and the decisions of at least four other Circuits. On its face, it would invalidate as a matter of law most if not all of the hundreds of thousands of IEPs in the Fourth Circuit alone.

Furthermore, the decision of the Court of Appeals Panel's majority here, holding that the omission on an IEP form of any one item, even if discussed at an IEP meeting and known to parents, and not impacting the delivery of special education to a student, nonetheless as a matter of law substantively invalidates the IEP, significantly departs from the "harmless error" analysis widely applied by lower federal courts to procedural issues under IDEA. Almost all decisions of the federal courts of appeal have held that procedural errors that do not prevent parental participation in the IEP process, or substantively impact the delivery of special education services, do not deny FAPE. The Court of Appeals' majority decision here, by contrast, articulates a categorical "matter of law" approach.

In the thirty years since the effective date of IDEA's predecessor, this Court has not addressed or articulated a standard for determining whether or when an asserted procedural error in creating an IEP constitutes a deprivation of FAPE. As Circuit Judge Gregory pointed out in his dissent from the Court of Appeals' failure to grant rehearing of the Panel opinion below, that jurisprudence is now in disarray in the Fourth Circuit, and in conflict in a number of the other Circuits. The effect is that local school districts, such as

the School Board here, are put at considerable financial risk in attempting in good faith to provide special education for disabled students.

I. The Individuals with Disabilities Education Act Does Not Mandate that an Individualized Education Program Designate a Specific School.

A. The Court of Appeals' Decision Conflicts with Longstanding Authority from Other Circuits, as well as the Consistent Interpretation of the Department of Education, and the Sole Example Provided by the Legislative History.

IDEA is the federal statute governing the way local school districts nationwide provide special education services to primary and secondary-age students with disabilities. 20 U.S.C. §§ 1400, *et seq.* It was first enacted in 1975 as the "Education of All Handicapped Children Act" ("EHA"), P.L. 94-142, and was most recently amended in 2004 by the Individuals with Disabilities Education Improvement Act. The IDEA ensures that all children with disabilities are given access to a free and appropriate public education ("FAPE"), by authorizing federal financial assistance to States and to local school systems. 20 U.S.C. § 1412(a)(1).

One of IDEA's (and EHA's) core requirements has always been that school districts prepare and propose an Individualized Education Program, or "IEP", for each eligible student. This Court has described an IEP as, "a comprehensive statement of

the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 367-68 (1985) (citation omitted).

The Court of Appeals' decision here conflicts directly with established authority from other Circuits, and from the Fourth Circuit itself, holding that, "***An IEP is not location-specific***; the place at which an IEP is implemented may change without the IEP itself changing." *Leonard v. McKenzie*, 869 F.2d 1558, 1562-63 (D.C. Cir. 1989) (emphasis added); *Weil v. Board of Elementary and Secondary Educ.*, 931 F.2d 1069, 1072 (5th Cir. 1991); *Christopher P. v. Marcus*, 915 F.2d 794, 796 n.1 (2nd Cir. 1990); *A.W. v. Fairfax County School Board*, 372 F.3d 674, 683 (4th Cir. 2004); *Jennings v. Fairfax County School Board*, 35 IDELR 158 (E.D. Va. 2001) (reproduced in the Appendix at App. 81a-102a), *aff'd*, 2002 U.S. App. LEXIS 14372, at **14 (4th Cir. 2002) ("the district court correctly decided the legal issues before it. Accordingly, we affirm on the reasoning of the district court.")[4]; *Concerned Parents & Citizens for the Continuing Educ. at Malcolm X . (PS79) v. New York City Board of Ed.*, 629 F. 2d 751, 754 (2nd Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981)

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[4] This unreported case, decided in 2002 by a different panel of the U.S. Court of Appeals for the Fourth Circuit, involved the identical issue and arguments (and the same District Judge, same counsel, and one of the same schools), but reached a conclusion directly contrary to the Panel's . Because *Jennings* was decided prior to the effective date of Fed. R. App. 32.1(a), however, it was not addressed, or referenced, in the Panel's decision here.

("placement" means only the "general educational program"); *John M v. Board of Educ. of Evanston Township*, 2007 U.S. App. LEXIS 22146, at *10-15 (7th Cir. 2007) (same); The District Court had correctly relied upon these decisions in concluding that the School Board's IEP here was not required to identify an individual school.

The Court of Appeals' decision here cannot be reconciled with these and other decisions of many federal circuits interpreting and applying IDEA's "stay-put" provision, 20 U.S.C. § 1415(j). The Court of Appeals' decision in this case erroneously treats the foregoing subsection as unrelated to IDEA's provisions setting forth the required content of an IEP. 20 U.S.C. § 1414(d)(1)(A). These two IDEA provisions are, however, directly related. The "stay-put" requirement mandates that during the pendency of administrative or judicial proceedings, the student at issue must continue to receive a FAPE in his then-current "educational placement." 20 U.S.C. § 1415(j). Appropriate educational placement must by definition be in conformity with the provisions of a student's IEP. 20 U.S.C. § 1402(9)(D); 34 CFR 300.116(b)(2) ("child's placement" must be "based upon the child's IEP."). The contents of a student's IEP, in turn, are prescribed by 20 U.S.C. § 1414(d)(1)(A). The Courts of Appeal in *Leonard, Weil, Christopher P., John M., Concerned Citizens & Parents* and *A.W.* reached the results they did precisely because the student's IEP was ***not*** required to identify a single, specific school at which it would be implemented.

IDEA has been amended and reauthorized several times since its original adoption, including in

1991, 1997 and 2004. A central purpose of the 1997 amendments was to encourage school districts to educate disabled students in less restrictive environments by providing supportive services, therapies or accommodations in regular classes wherever possible. Individuals with Disabilities Education Act Amendments of 1997, §§ 601(c)(5) (A), (D).[5] In this context, the IEP content requirements were amended so that the "location" or place within the school could be specified. 20 U.S.C. § 1414(d)(1)(A)(vi) (1997), now codified at 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (2004). The amendment itself did not define "location." Nonetheless the one and only example of "location" cited in the legislative history is consistent with the understanding of "location" in this subsection as referring to the location of services within an educational program, rather than location of the school within which an educational program would be provided. It states:

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[5] The findings to the 1997 amendments provided in part:

> (5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by--
>
> (A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible;
>
> * * *
>
> (D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate;

Individuals with Disabilities Education Act Amendments of 1997, §§ 601(c)(5) (A), (D).

> For example, the appropriate place for the related service may be the regular classroom, so that the child does not have to choose between a needed service and the regular educational program.

Senate Report S. 717, at 19 (May 9, 1997). At the same time, nothing in the legislative history to either the 1997 or 2004 reauthorizations of IDEA suggests that Congress intended to overturn the consistent administrative and judicial interpretations providing that IEPs are not required to identify a specific school. *See* Senate Report 105-17 (May 9, 1997); House Conference Report 108-779.

With regard to the terms of an IEP, the U.S. Department of Education has consistently interpreted "location" as specifying the type of environment (such as regular classroom, separate resource room, etc.) *within* the school, rather than the identity *of* a specific school:

> The *``location'' of services in the context of an IEP generallyrefers to the type of environment that is the appropriate place for provision of the service.* For example, is the related service to be provided in the child's regular classroom or in a resource room?

64 Fed. Reg. 12605 (March 12, 1999) (commentary to regulations implementing 1997 amendments to IDEA) (emphasis added); 71 Fed. Reg. 46588, 46687 (Aug. 14, 2006) (commentary to regulations implementing 2004 amendments to IDEA). Both before and since the 1997 IDEA reauthorization, this administrative agency,

which is charged with implementing IDEA, has interpreted an IEP as not requiring designation of a specific school. *See Letter to Autin*, 20 Individuals with Disabilities Education Law Reporter ("IDELR") 1157 (U.S. Department of Education, Office of Special Education Programs ("OSEP") (1993); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994); *Letter to Green*, 22 IDELR 639 (OSEP 1995).

The Court of Appeals' decision here observes that the IDEA itself does not define "location" as that term is used in the section setting forth the content of an IEP, 20 U.S.C. §1414(d)(1)(A)(i)(VII). App. 11a, 21a. Where a statutory term is ambiguous or undefined, courts should defer to a reasonable interpretation by the administrative agency entrusted with enforcement of that statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843- 45 (1984)); *Honig v. Doe*, 484 U.S. 305, 326 n.8 (1988). An "ambiguous" statutory term is one, "capable of being understood in two or more possible senses or ways." *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001).

At a minimum, the meaning of "location" as used in 20 U.S.C. §1414(d)(1)(A)(i)(VII) clearly is susceptible of more than one interpretation. The Court of Appeals concluded by looking at the term itself that "location" must refer to the identity of a specific school because selection of a specific school "can" "could" or had the "potential" to affect the appropriateness of an educational program. App. 11a, 12a. In many situations, however, other federal circuits, and the U.S. Department of Education, have held that an IEP is not location-specific, and that the identity of a specific

school did ***not*** determine the appropriateness of the educational program offered. *Leonard*, 869 F.2d at 1562-63; *Weil*, 931 F.2d at 1072 ; *Christopher P.*, 915 F.2d at 796; *A.W.*, 372 F.3d at 683; *Letter to Autin*, 20 IDELR 1157; *Letter to Fisher*, 21 IDELR 992; *Letter to Green*, 22 IDELR 639. The Court of Appeals here failed to recognize that with respect to IEPs, both most other federal courts of appeal, and the regulatory agency responsible for administering the IDEA have consistently interpreted "location" to be the location of services ***within*** *an educational program*, rather than location ***of*** *the educational program itself.*

This situation is similar in this respect to that in *Honig*. This Court was there called upon to interpret and apply EHA's "stay-put" provision, which prohibits a "change of placement" during the pendency of legal proceedings.[6] With respect to that phrase, this Court noted:

> The EHA nowhere defines the phrase "change in placement," nor does the statute's structure or legislative history provide any guidance as to how the term applies to fixed suspensions. Given this ambiguity, we defer to the construction adopted by the agency charged with monitoring and enforcing the statute. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

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[6] That statutory provision, then codified at 20 U.S.C. § 1415(e)(3), was recodified to 20 U.S.C. § 1415(j)(2004) as part of the 2004 reauthorization.

484 U.S. at 326 n.8. This Court therefore adopted the interpretation of the U.S. Department of Education. *Id.*

Likewise here, IDEA does not define "location", and its legislative history does not conclusively do so either. Without analysis or consideration of the Department of Education's position, the Court of Appeals simply assumed that the term referred to location of the school, rather than location of the services within the educational program. In the absence of any support in IDEA's text or legislative history for interpreting "location" exclusively as "school", it is the Department of Education's interpretation, not the court's own notion of education policy, which is entitled to deference.

B. The Court of Appeals' Decision Ignores the Practical and Policy Considerations Associated with Tying Every IEP to a Particular School.

Though stating, "This is not how the IDEA is designed to work" (App. 14a), the Court of Appeals' decision here demonstrates little understanding of the way the IEP and placement process actually does work. IDEA, and the IEP process it includes, is intended to prescribe a general program of special education that allows each disabled student to receive educational benefit. At the same time, an IEP is not intended to prescribe every detail of that educational program. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 208 (1982). Reading IDEA to require that each and every proposed IEP necessarily include the name of the specific school where it will be implemented ignores important IDEA

policies considerations recognized both by this Court and by lower courts.

For example, "the core of the statute . . . is the cooperative process that it establishes between parents and schools. . . The central vehicle for this collaboration is the IEP process." *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). In the many cases where private school placement is a consideration, school districts necessarily rely upon cooperation from parents in that process in order to identify wherever possible an appropriate day school rather than a residential school. Doing so serves the important IDEA goal of educating students in the "least restrictive environment." 20 U.S.C. § 1412(a)(5).

The effect of the Court of Appeals' decision here, however, is to encourage parents not to participate fully in IDEA's IEP process in order to identify a less restrictive specific placement. In such private school cases – such as this one – public school staff do not have the ability unilaterally to commit private day or residential schools to enroll a student. As Judge Gregory noted in his dissent, and the majority does not dispute, offering a specific school requires that parents and student be willing to participate in the application and interview process. App. 26a, 30a n.3. The Court of Appeals' majority decision here permits parents to reject *as a matter of law* an IEP even before a school district has the opportunity to confirm the availability of a specific school through the interview process.

IDEA also envisions that school districts will have some degree of flexibility and discretion in responding to changing conditions in the operation of schools. *John*

M., 2007 U.S. App. LEXIS 22146, at *12-13; *Concerned Parents & Citizens*, 629 F. 2d at 754. The categorical rule announced by the Court of Appeals here, however, ties the hands of school districts in many situations where students must move from one school to another, such as for disciplinary reasons, matriculating to a higher grade, or because a school or school program is opened, closed, or consolidated.

In *A.W.*, for example, the Fourth Circuit held that a student who had made threats against another student could – consistent with his existing IEP – be moved from one school, to an analogous program at a different school nearby, precisely because his IEP was not tied to a specific school. The Court of Appeals observed, "' educational placement' fixes the overall instructional setting in which the student receives his education, rather than the precise location of that setting." 372 F. 3d at 683. After carefully reviewing the language of IDEA and its implementing regulations, the Court concluded that, "consider[ing] the structure and goals of the IDEA as a whole, in addition to its implementing regulations, reinforces our conclusion that the touchstone of the term 'educational placement' is not the location to which the student is assigned but rather the environment in which the educational services are provided." *Id.* at 682. The same principle applies here.

Likewise in *John M.* the Seventh Circuit held that a student could – consistent with the "maintenance of educational placement" provision of IDEA – be transferred from middle school to high school when he reached the appropriate age limit for the former. The Court rejected the notion that enforcing his existing

IEP required continuing his placement in the particular school (there, a middle school) that he had been attending. 2007 U.S. App. LEXIS 22146, at *14-15.

In many other situations, Courts of Appeal have held that IDEA permitted a school district to transfer a special education student from one school to a similar program at another location, because the IEP and educational placement did not dictate a particular school. *See, e.g. Tilton v. Jefferson County Bd. of Educ.*, 705 F.2d 800, 804 (6th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984) (school closed for budgetary reasons); *Concerned Parents & Citizens*, 629 F. 2d at 754 (same); *Weil*, 931 F.2d at 1072 (existing school closed for reasons beyond school district's control); *McKenzie*, 869 F.2d 1572-73 (renewed availability of public program similar to private school program); *Letter to Green*, 22 IDELR 639 (private school became decertified); *Letter to Autin*, 20 IDELR 1157 (consolidation of schools); *Letter to Fisher*, 21 IDELR 992 (Department of Education ordered separate school closed to meet IDEA "least restrictive environment" requirements). If the specific school itself were a required part of the IEP, none of these changes would have been permissible, since each would have been contrary to the expressed terms of that IEP. *See John M*, 2007 U.S. App. LEXIS 22146, at *15 ("Generally the terms of this IEP should be enforced, without exception, as the stay-put relief.").[7]

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[7] That is further compounded in states such as Virginia, where "changes in placement" may not be made without parental permission. 8 VAC 20-80-76(E)(1)(c) (2001).

The Panel majority below relied upon two decisions out of the Ninth Circuit, *Glendale Unified School District v. Almasi*, 122 F. Supp. 2d 1093 (C.D. Cal. 2000), and *Union School District v. Smith*, 15 F.3d 1519 (9th Cir. 1994), to support its holding that IDEA requires a school system to offer a specific school facility on the IEP. Both those cases, however, are ones in which the district's proposed IEP failed to specify not merely the particular school, but did not at all set forth a specific educational "placement" at issue. Thus in *Glendale*, the school system had offered "multiple placement types," including both a full-inclusion public school placement, and two different private day school programs. 122 F. Supp. 2d at 1105-6. The hearing officer had therefore found that the school district was offering a "wide range of diverse placements." *Id.* at 1107. Likewise in *Union School District*, the school division actually offered one kind of placement (a communicatively handicapped class in a public school setting), but later argued that an entirely different placement (a separate autism program) was appropriate. 15 F.3d at 1525. The Court of Appeals also relied upon the Sixth Circuit's decision in *Knable v. Bexley City School District*, 238 F.3d 755 (6th Cir. 2001). In *Knable*, however, the school system had failed to offer any IEP for an entire school year despite Parents' repeated requests that it develop one. 238 F.3d at 764-66. Fundamentally unlike any of these three decisions, here the school division did offer an IEP describing a single, discrete placement, "private day school", understood to have a detailed and specific set of educational characteristics.[8]

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[8] The Court of Appeals agreed with the District Court that, "'[p]rivate day school' placement is a term of art describing an

In any event, to the extent those decisions require that every IEP a school district prepares, *by definition*, must set forth a specific, individual school, they represent, at most, a minority position. That an individual school may in some isolated situation be inappropriate does not warrant imposing on all school districts the requirement that *every* IEP name a particular school. In those few cases where parents believe that a school district's proposed program is inadequate due to the identity of the specific school, they always have resort to IDEA's administrative procedures for addressing the dispute, including a resolution meeting, mediation, or a due process hearing. *See* 20 U.S.C. §§ 1415(e), (f)(1)(A, B); *Letter to Flores*, 211 IDELR 233 (OSEP 1980). The effect of the Panel's decision here, however, is to invalidate as a matter of law literally every IEP that does not list a specific school, or omits any of the many other items listed in 20 U.S.C. § 1414(d)(1)(A) even where – as here – the substance of the educational programs offered is completely appropriate. This unnecessarily and unexpectedly exposes local school systems to substantial monetary claims under IDEA in every such case.

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educational program which includes several characteristics such as a small overall student body size, small classes, small facility, extensive clinical support, the ability to work individually with a student, extensive behavioral management, and parental involvement." App. 16a, n.1.

II. Technical Procedural Missteps in the Creation of an IEP that Do Not Prevent Parental Participation in the IEP Process, or Have an Effect on the Provision of an Appropriate Education, Cannot be the Basis for a Finding that a School Division has Substantively Denied a "Free Appropriate Public Education" under IDEA.

The IDEA contains myriad procedural requirements. These include, *inter alia*, procedures for identifying potentially disabled students, 20 U.S.C. §1412(a)(3); evaluating and reevaluating students, 20 U.S.C. §§ 1414(a), (b), (c); and those associated with preparing and implementing an IEP, 20 U.S.C. §§ 1414(d), (e), (f); 20 U.S.C. § 1412(a)(5).

In its first decision interpreting IDEA's predecessor statute 25 years ago, this Court held that where a student claims he was denied a FAPE, the court should consider, first, whether the school district complied with the Act's procedural requirements. *See Rowley*, 458 U.S. at 206-07.[9] This Court did not there, however, articulate any standard for determining when – or whether – a school district's failure to adhere to one of IDEA's many procedural requirements could by itself be grounds for holding that the school district had failed to offer a FAPE.

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[9] This Court in *Rowley* set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the school district must have "complied with the procedures set forth in the Act." 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-07.

Nor have this Court's limited number of IDEA decisions since that time addressed the effect of procedural problems, including those involved with the creation of an IEP. Rather, several of this Court's decisions have involved situations where the *substance* of the educational program was alleged not to provide educational benefit. *E.g. Irving Independent School District v. Tatro*, 468 U.S. 883, 890 n.6 (1984) (case "presents the legal question of a school's substantive obligation under the 'related services' requirement of § 1401(17)"); *Florence County School District v. Carter*, 510 U.S. 7, 15 (1993) (affirming lower court rulings that parents could be awarded private school tuition reimbursement where school district proposed educational program and IEP goals were "wholly inadequate", even if private school did not comply with all IDEA procedures); *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999) (nursing service necessary for student to attend school at all). The other IDEA (or EHA) decisions of this Court have concerned practice and procedure issues under IDEA. These have included, for example, the burden of proof in administrative proceedings, *Schaffer v. Weast*, 546 U.S. 49 (2005); availability of reimbursement for expert witness fees, *Arlington School District Bd. of Educ. v. Murphy*, 126 S. Ct. 2455; 165 L. Ed. 2d 526 (2006); the effect of the "stay-put" provision, and mootness of certain claims, *Honig v. Doe*, 484 U.S. 305 (1988); resort to other federal statutes in addition to EHA, *Smith v. Robinson*, 468 U.S. 992 (1984); and the standing of parents to proceed in court pro se, *Winkelman v. Parma City School District*, 127 S. Ct. 1994; 167 L. Ed. 2d 904 (2007). None of this Court's decisions address a situation frequently presented in IDEA cases, i.e. that in which the substance of a proposed educational

program would be appropriate, but there are asserted procedural violations associated with the proposal.

That issue is squarely presented here. The Panel majority's holding here does not challenge the District Court's finding that substantively, both the Phillips and Kellar School programs would have provided educational benefit to A.K., as required by this Court's decision in *Rowley*. App. 42a-44a, 27a-28a. As Circuit Judge Gregory stated in his dissent here, even if the School Board's failure to include a specific school name on the IEP itself was an IDEA violation, it was at most a technical procedural error that did not substantively deprive the Student of any educational opportunity. App. 22a-31a.

The Panel majority, on the other hand, held that "as a matter of law," by failing to include the name of a specific school on the IEP, the school district had deprived the Student of a FAPE. The effect of the majority's ruling is that any procedural error in the creation of an IEP – including specifically the failure to include in the document itself any item listed in 20 U.S.C. §1414(d)(1)(A) – is necessarily a "substantive" IDEA violation that automatically invalidates the IEP, irrespective of whether it caused any actual educational harm or deprivation. This position is at odds both with the vast majority of decisions from the federal courts of appeal assessing the substantive impact of procedural violations, as well as the clearly-expressed policies underlying IDEA.

The Fourth Circuit's prior decisions themselves unambiguously held that procedural violations are grounds for finding a denial of FAPE only when the

violations result in an actual loss of educational opportunity. *See, e.g., Burke County Board of Education v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990); *DiBuo v. Board of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir. 2002) (rejecting *per se* rule invalidating IEP where procedural violations exist); *M.M. v. School Dist. of Greenville County*, 303 F.3d 523, 533-34 (4th Cir. 2002); *Board of Education of Montgomery County v. Brett Y*, No. 97-1936, 1998 U.S. App. LEXIS 13702, at *23 (4th Cir. June 26, 1998). For example in *M.M.*, the Fourth Circuit held that failure to offer a complete IEP was a "technical" and "procedural" IDEA violation that did not result in any prejudice, where parents would not have accepted the IEP in any event. 303 F.3d at 533-35.[10] Likewise in *Brett Y*, this Court held that though a proposed IEP recommended a school that required the student to interview to gain final acceptance, which did not occur by the beginning of school year, this was a procedural issue that did not deny FAPE. 1998 U.S. App. LEXIS 13702, at *23.

In contrast to the Panel majority's opinion here, two other Circuits have specifically held that lack of a specific school may be a "procedural" or "technical" matter, omission of which does not cause any substantive deprivation of FAPE. These include the Fifth Circuit, *White ex rel. White v. Ascension Parish*

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[10] Relying upon the Sixth Circuit's decision in *Knable v. Bexley City School District*, 238 F.3d 755 (6th Cir. 2001), the Panel majority itself acknowledged the inconsistency between that holding and the Fourth Circuit's holding in *M.M. v. School Dist. of Greenville County*, 303 F.3d 523, 533-34 (4th Cir. 2002), repeatedly citing to *M.M.* as "*but cf.*", but never directly addresses or explains the reason for the inconsistency. App. 14a, 17a n.7.

Sch. Bd., 343 F.3d 373, 379 (5th Cir. 2003), and the Eighth Circuit, *C.J.N. v. Minneapolis Public Schools*, 323 F.3d 630, 641 (8th Cir. 2002) ("the other purported deficiencies to which CJN directs our attention, such as the absence of a specifically identified "Public Separate Day School" in the March IEP (the IEP listed only the relevant setting level and not a precise location) are equally immaterial to our discussion given the February decision to enroll CJN in private school.").

In *White*, for example, the parents contended that the school district's proposed special education program deprived their child of a FAPE because they were not involved in selecting the particular school. The Fifth Circuit analyzed this issue as a "procedural" one. 343 F.3d at 379. The court described "location" as used in the IDEA provision concerning IEP contents is one of several "technical details" that are "primarily administrative" in nature. *Id.* Determining that it did not deprive the student of a FAPE, the court said:

> Ascension responds that "placement" does not mean a particular school, but means a setting (such as regular classes, special education classes, special schools, home instruction, or hospital or institution-based instruction). . . This is the better view.

343 F.3d at 380. The Fourth Circuit majority recognized in its decision here that in describing the lack of a particular school name on the IEP as "substantive", and depriving FAPE as a matter of law, it was departing from the Fifth Circuit's analysis in *White*. App. 12a. The School Board submits that – as the dissent below suggests, App. 26a – the lack of a

particular school name on the IEP is the type of procedural issue that should have been analyzed according to whether it denied the Student any educational opportunity.

Though argued by the School Board and discussed at length in the dissent, the Panel majority skirts almost entirely the issue of whether the absence of a school name on the IEP is a substantive, rather than a "technical," "administrative" or "procedural" matter. The majority's only treatment of it comes in a footnote, which states without authority that the omission of a school name is "substantive", and therefore no analysis of harmlessness can apply. (App. 17a-18a n.7). The Panel majority's position on this is clear. The Court asserts that though Parents knew that two specific schools (Phillips and Kellar) had been proposed, that fact was "not dispositive." App. 19a. The School Board respectfully suggests that the approach of the Fifth and Eighth Circuits, as well as the dissent below, considering these as procedural or technical details assessed for any substantive educational impact, is the proper one.

Furthermore, other courts of appeal have concluded that the absence of other particular IEP items prescribed by IDEA may amount to harmless procedural error. These include the Fifth Circuit, *Adam J. v. Keller Independent School Dist.*, 328 F.3d 804, 811 (5th Cir. 2003) (IEP's failure to include some required items, such as long-term goals, short-term objectives and current level of competency, were "procedural defects" that did not result in loss of educational opportunity or infringe parental opportunity to participate in IEP process); the Sixth

Circuit, *Nack v. Orange City School Dist.*, 454 F.3d 604, 612 (6th Cir. 2006) (lack of some IEP content required by 20 U.S.C.§ 1414(d)(1)(A), including educational baseline and measurement criteria, were "procedural flaws" that did not cause substantive harm); *Doe v. Defendant I*, 898 F.2d 1186, 1190-91 (6th Cir. 1990) (failure to include some of "myriad of technical details that must be included in the written document" did not invalidate IEP, where known by administrators and parents, "even though it was not contained within the four corners of the IEP."); and the Seventh Circuit, *Hjortness v. Neenah Joint School District*, 2007 U.S. App. LEXIS 19744, *9-10 (7th Cir. 2007) (though school district should have convened second IEP meeting to review some IEP items not discussed in first meeting, "this procedural violation does not rise to the level of a denial of a free appropriate public education. The record does not support a finding that [the student's] parents' rights were in any meaningful way infringed."). Though becoming effective after the date of this IEP, the 2004 amendments to IDEA confirm Congress' intent that reimbursement be awarded only on substantive, not simply procedural grounds. 20 U.S.C. § 1415(f)(3)(E).[11]

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[11] 20 U.S.C. § 1415(f)(3)(E) provides:

> (E) Decision of hearing officer.--
>
> (i) In general.--Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.
>
> (ii) Procedural issues.--In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural

Contrary to the holdings of these decisions, the analysis employed by the majority Panel decision here would invalidate as a matter of law any IEP in which any of the approximately twenty-four different items listed in 20 U.S.C. § 1414(d)(1)(A) are discussed at the IEP meeting, but not written on the IEP form. The effect on that decision is to render local school districts liable to reimburse parents for private school tuition in any such case. *See Florence County School District v. Carter*, 510 U.S. 7 (1993). That was not intended by Congress in amending the IDEA.[12]

While IDEA is a federal grant statute, its funding covers only a small fraction (less than 20%) of the per-pupil cost that local school districts face in providing

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inadequacies--

> (I) impeded the child's right to a free appropriate public education;
>
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
>
> (III) caused a deprivation of educational benefits.

[12] Thus, in addition to the many other practical and policy problems with the Panel's decision, as explained in detail above, the Panel's decision here is inconsistent with this Court's recent holding in *Arlington School District Bd. of Educ. v. Murphy*, 126 S. Ct. 2455; 165 L. Ed. 2d 526 (2006) that IDEA, as Spending Clause legislation, must unambiguously set forth any and all obligations by which the states will be bound when accepting federal IDEA funds.

special education to students with disabilities.[13] This Court recognized in *Murphy* that IDEA did not seek to address the goal of providing disabled students with an appropriate education without regard to "fiscal considerations." 126 S. Ct. at 2463; 165 L. Ed. 2d at 538.

Reimbursement of private school tuition is limited to situations where the parents establish that the school district is incapable of providing FAPE and that the private school placement is proper. 20 U.S.C. § 1412(a)(10)(C)(ii); *Carter*, 510 U.S. at 13-15. Those conditions serve the public interest that public funds not be spent to support inappropriate or unnecessary private placements. *See* 64 Fed. Reg. 12602 (March 12, 1999). Indeed, one specific purpose of the 1997 amendments to IDEA was to control government expenditures for students voluntarily placed in private schools by their parents. *Greenland School District v. Amy N.*, 358 F.3d 150, 152 (1st Cir. 2004); House Report No. 105-95 (1997), at 91-92.

As Circuit Judge Gregory pointed out in his dissents below, the decision of the Court of Appeals' majority in this case unfairly punishes local school districts for technical but harmless errors, rendering them subject to large sums for private tuition payments even in cases where an error in the preparation of an IEP has no effect on the substance of the education that a disabled student would receive. App. 48a. This case presents an opportunity to rectify the "unclear state of

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[13] NSBA, *Federal Funding for Education*, at 2 (2006), *available at* http://www.nsba.org/site/docs/35100/35033.pdf

the law" to which he refers, and which the majority decision below has introduced. *Id.*

CONCLUSION

For the foregoing reasons, the School Board's petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 22, 2007

(Any footnotes trail end of document)

No. 06-1130
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

A.K., a minor by his parents and next friends J.K. and E.S.,
Plaintiff-Appellant,

v.

ALEXANDRIA CITY SCHOOL BOARD,
Defendant-Appellee.

November 30, 2006, Argued

April 26, 2007, Decided

JUDGES: Before WILKINS, Chief Judge, and WILLIAMS and GREGORY, Circuit Judges. Chief Judge Wilkins wrote the majority opinion, in which Judge Williams joined. Judge Gregory wrote a dissenting opinion.

OPINION BY: WILKINS, Chief Judge:

OPINION

WILKINS, Chief Judge:

The parents of A.K., a minor child with disabilities, brought this action on his behalf against the Alexandria City School Board, alleging that Alexandria City Public Schools ("ACPS") violated the Individuals with

Disabilities Education Act (IDEA), *see* 20 U.S.C.A. §§ 1400-1487 (West Supp. 2006). The parents appeal an order granting summary judgment against them. We reverse and remand for further proceedings.

I.

A.

The IDEA provides every disabled child with the right to a "free appropriate public education" (FAPE) designed to meet his specialized needs. *Id.* § 1400(d)(1)(A). Congress has defined a FAPE as

special education and related services that . . . (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate . . . education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title. *Id.* § 1401(9).

A school provides a FAPE by creating an "individualized education program" ("IEP") for each child. *See id.* § 1414(d)(1)(A); *County Sch. Bd. v. Z.P. ex rel. R.P.*, 399 F.3d 298, 300 (4th Cir. 2005). Before creating the IEP, the school district must conduct an initial evaluation to determine the student's eligibility and to identify his educational needs. *See* 20 U.S.C.A. § 1414(a)(1)(A)-(C). If the child is deemed eligible, an IEP is created by an "IEP Team" comprised of the child's parents, at least one of his regular teachers, at least one of his special education teachers, a school board representative, an individual who can interpret

evaluation results (who may be either of the teachers or the school board representative), and, if appropriate, the child himself. *See id.* § 1414(d)(1)(B). The IEP must outline the student's then-current educational status, establish annual goals, and detail the special educational services and other aids that the child will be provided. *See id.* § 1414(d)(1)(A)(i). It also must provide, among other things, "the projected date for the beginning of the services and modifications . . ., and the anticipated frequency, location, and duration of those services and modifications." *Id.* § 1414(d)(1)(A)(i)(VII). An IEP is substantively satisfactory if it is "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

The IDEA also provides "procedural safeguards to insure the full participation of the parents and proper resolution of substantive disagreements." *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985) (internal quotation marks omitted). As is relevant here, those safeguards include the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C.A. § 1415(b)(6)(A); *see id.* § 1415(f). The IDEA also authorizes a party aggrieved by the state administrative proceeding intended to resolve the complaint to challenge the decision in a federal court action. *See id.* § 1415(i)(2)(A). Such an action is an independent civil action in which the district court considers the state administrative hearing record, as well as any new evidence that the parties offer, and makes findings by a preponderance of

the evidence. *See id.* § 1415(i)(2)(C). Although the federal court action is an independent action, the court must give "due weight" to the state administrative proceeding. *Rowley*, 458 U.S. at 206.

B.

A.K. was first found eligible to receive special education services under the IDEA at age two and one-half. At that time, A.K. was diagnosed with Semantic Pragmatic Language Disorder with characteristics of nonverbal learning disability. A.K. has since been diagnosed as well with numerous other disorders, including Aspergers Syndrome and obsessive compulsive disorder. A.K. was educated in the ACPS school system through the seventh grade until he began to be teased and assaulted by other students to an extent that he no longer felt safe. A.K.'s parents ("the parents") subsequently searched unsuccessfully for a private day school in the Washington, D.C. metropolitan area that could meet their son's specialized needs.

For the 2003-04 school year, when A.K. was in the eighth grade, the parents enrolled A.K. in the Riverview School, a residential school in Massachusetts, pursuant to a settlement between the parents and ACPS. ACPS had proposed local private day school but agreed to fund the portion of Riverview tuition that was equivalent to private day school placement. The parents were very happy with A.K's progress at Riverview.

In preparation for the 2004-05 school year, A.K.'s IEP team, which included ACPS personnel, Riverview

personnel, and the parents, met on May 21 and 28, 2004, and June 9, 2004 for a total of eight to ten hours. Until the last half hour of the final meeting, the team spent its time defining A.K.'s level of performance and setting goals and objectives for the upcoming year. With only a few minutes of discussion regarding placement, ACPS announced that A.K. should be placed at an unspecified private day school. [1] Unaware of any private day school in the area equipped to meet A.K.'s specialized needs, the parents asked ACPS representatives which private day school he could attend. Susan Sullivan, ACPS's private placement specialist and the IEP team chairperson, suggested the Kellar School and the Phillips School as possibilities. A.K.'s mother responded that she did not believe either of those schools would be appropriate. The meeting closed without any significant discussion about the appropriateness of Kellar or Phillips or any other possible private day schools.

The resulting IEP contained a detailed discussion of A.K.'s then-current level of performance. It also set forth goals and objectives, along with a plan to aid A.K. in the transition from Riverview to a private day school. However, it did not identify any particular school but simply listed A.K.'s placement as "Level II--Private Day School placement." J.A. 379. Based on their objection to that placement, the parents refused to sign the IEP. [2]

In July 2004, ACPS sent out applications on A.K.'s behalf to five area private day schools: The Lab School, The Ivymount School, Oakmont School, Phillips, and Kellar. Based on the applications provided, The Lab School and Oakmont (and perhaps Ivymount) determined that they could not provide A.K. a FAPE

due to the complexity of his disabilities.[3] However, Phillips and Kellar both indicated that they believed, based on the information they had received, that they had an appropriate program for A.K., and invited him and his parents to visit the school.

A.K.'s mother toured both schools in July, n4 and, after consulting with some experts who were familiar with A.K., determined that neither school would be able to meet A.K.'s specialized needs. Having been unable to find any local private day school that they believed could provide A.K. with a FAPE, the parents, on July 9, 2004, requested an administrative special education due process hearing to determine whether ACPS had offered A.K. a FAPE. ACPS sent a letter to the parents in early August informing them that Phillips and Kellar wanted to schedule interviews with A.K., but the parents, having determined that those schools could not serve A.K.'s needs, did not seek to schedule such interviews.

At the due process hearing, the parents did not challenge the notion that a private day school could theoretically meet A.K.'s needs, but they argued that the IEP failed to identify a particular school in the area that could do so and that they had not been able to find one.[5] Thus, the parents sought reimbursement for their Riverview tuition on the ground that ACPS had failed to offer A.K. a FAPE and Riverview provided an appropriate education.

Both sides presented testimony regarding whether Phillips, Kellar, or Riverview was appropriate for A.K.'s individual needs. ACPS's testimony established that the Phillips School provides individualized

educational programs implemented by classroom staff. It also offers small group instruction, one-on-one intervention, speech and language development, and training in social and daily-living skills. The majority of students at Phillips are 14-18 years old, and they have a wide range of disabilities. Students with similar needs are generally grouped together in particular classrooms. Phillips utilizes a progressive level system, in which students are given more freedom and responsibility as their behavior and academic motivation improve. Laura Heyer, a program supervisor at Phillips who had previously taught at the school for 10 years, testified that she did not know of any reason why Phillips could not provide an appropriate program for A.K. Susan Sullivan expressed the same opinion.

Testimony showed that the Kellar School is a smaller school for middle and high school students. At Kellar, the students work in teams with a counselor in each classroom to help the students. Like Phillips, Kellar employs a level system, under which students gain independence as their work habits, academic work, and behavior improve. Sullivan testified that she believed Kellar would have been able to provide A.K. with a beneficial education.

The parents, on the other hand, presented testimony from two experts that neither Phillips nor Kellar could meet A.K.'s specialized needs. They first presented the testimony of Cheryl Weitz, a licensed social worker in the practice of child psychotherapy who frequently works in IEP development. She testified that many of the students at Phillips were aggressive, disruptive, and occasionally violent. She testified that she would

expect that A.K., if placed at Phillips, would "regress into that fearful, anxious state where he would be more shutdown in self-protection." J.A. 921. She also opined that Phillips' focus on eliminating problems in behavior and motivating students to try to learn would cause A.K., who did not have significant behavior or motivation problems, to regress cognitively. She expressed similar concerns about Kellar based on her view that Kellar educated many children with psychiatric problems who often are violent and attend the school for only a short period. She stated that although she believed A.K. could benefit educationally from a private day school "if the structure were appropriate," she did not believe that either Kellar or Phillips "would be appropriate" considering A.K.'s needs. *Id.* at 923-24. [6]

Dr. William Stixrud, a neuropsychologist in private practice, expressed similar reservations about A.K.'s prospects in schools having a significant number of students with psychiatric and behavior problems. Dr. Stixrud opined that such a setting would be "counterproductive in terms of [A.K.'s] availability for learning and his ability to benefit from education that focuses on academics or adaptive behavior." *Id.* at 1006. Like Weitz, Dr. Stixrud did not testify that no private day school could meet A.K.'s needs. Rather, he testified that A.K.'s multiple disabilities overlapped, providing a complex set of challenges requiring a very specific type of learning environment in order for A.K. to make academic progress. He testified that he was not aware of any private day school geographically accessible to A.K. that could meet A.K.'s specialized needs.

The hearing officer denied the parents' claim. He concluded that ACPS did offer A.K. a FAPE by offering him education at "private day school." Although the hearing officer did not specifically resolve the parents' contentions that Phillips and Kellar could not offer A.K. a FAPE, he did discuss ACPS's failure to identify a particular school that could meet A.K.'s specialized needs:

> The fact that ACPS did not specify a particular private day program suggests to me that ACPS wanted to give the parents as much flexibility as possible on this issue. Several private day possibilities were suggested, and the parents [were] given the option of choosing the one which was most attractive to them. The fact that they found none of the possibilities attractive does not mean that the ACPS approach was not in accordance with the FAPE mandates. Thus I conclude that private day placement does provide FAPE. *Id.* at 1305.

Dissatisfied with this result, the parents brought the present civil action in federal district court, again seeking reimbursement for their Riverview tuition. They alleged not only that the IEP failed to offer a FAPE, but also, as is relevant here, that ACPS had failed to notify the parents before the IEP meetings that private day placements in their area would be considered. The district court granted summary judgment against the parents. *See A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 409 F. Supp. 2d 689 (E.D. Va. 2005). On the notification question, the district court ruled that the parents were on notice that private day schools in their area would be considered because ACPS had recommended private day school placement for the 2003-04 school year. *See id.* at 693. With regard

to substantive compliance, the district court concluded that ACPS's mentioning of Kellar and Phillips during the final IEP meeting constituted a "placement offer" of those two schools. *Id.* at 694. Citing the testimony of the ACPS officials that the offer was appropriate, the district court found that ACPS offered A.K. a FAPE. *See id.* at 694-95.

II.

The parents argue that the district court erred in determining that the school district complied with the substantive components of the IDEA. In particular, they maintain that ACPS failed to offer a FAPE because its IEP did not identify a particular school at which it anticipated that A.K. would be educated.[7] We agree.

"When a state receiving IDEA funding fails to provide a FAPE, the child's parent may remove the child to a private school and then seek tuition reimbursement from the state." *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 320 (4th Cir. 2004). "The parent may recover if (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parents were appropriate to the child's needs." *Id.*

The parents bore the burden here of proving that the IEP was substantively deficient. *See Spielberg ex rel. Spielberg v. Henrico County Pub. Sch.*, 853 F.2d 256, 258 n.2 (4th Cir. 1988) (assigning burden to party challenging the hearing officer's decision); *cf. Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005) (holding that party

challenging IEP in due process hearing bears burden of proof). A determination that an IEP is sufficient is a factual finding that we review for clear error.[8] *See Z.P.*, 399 F.3d at 309 & n.7. However, such a finding is not entitled to deference to the extent that it is based upon application of an incorrect legal standard. *See id.* at 309.

The IDEA provides that an IEP must state "the projected date for the beginning of the services and modifications . . ., and the anticipated frequency, *location*, and duration of those services and modifications." 20 U.S.C.A. § 1414(d)(1)(A)(i)(VII) (emphasis added). The Senate Report concerning the 1997 amendments to the IDEA, which added the requirement that the location be identified, noted that the new requirement reflects the fact that the location "influences decisions about the nature and amount of these services and when they should be provided." S. Rep. No. 105-17, at 21 (1997). Indeed, we have previously discussed the potential importance of the particular location at which special educational services are provided. *See AW ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674 (4th Cir. 2004). In *AW*, the student alleged that the school district's transfer of him to a different classroom within the same school because of a pattern of misbehavior violated the "stay-put" provision of the IDEA, which requires that a student's "educational placement" not change while disciplinary proceedings are pending. *See* 20 U.S.C.A. § 1415(j); *AW*, 372 F.3d at 676, 678. We concluded that there was "little support in the IDEA's underlying principles for [the] assertion that 'educational placement' should be construed to secure [the] right to attend school in a particular classroom at a particular location." *AW*, 372 F.3d at 681. We held "that the term 'educational

placement' as used in the stay-put provision refers to the overall educational environment rather than the precise location in which the disabled student is educated." *Id.* at 676. We nevertheless observed that a change in the location at which special education services are provided causes a change in "educational placement" if the location change "results in a dilution of the quality of a student's education or a departure from the student's [least restrictive environment]-compliant setting." *Id.* at 682.

In light of the fact that the school at which special education services are expected to be provided can determine the appropriateness of an education plan, it stands to reason that it can be a critical element for the IEP to address. *See* Paolo Annino, *The 1997 Amendments to the IDEA: Improving the Quality of Special Education for Children with Disabilities*, 23 Mental & Physical Disability L. Rep. 125, 126 (Jan./Feb. 1999) (noting that requirement that IEP identify location at which special education is expected to be provided reflects the fact that "[a]ll schools and classes are not uniform"). *But see White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003) (holding that "[t]he provision that requires the IEP to specify the location is primarily administrative"). The identification of a particular school in the IEP indicates to the parents that the school district has carefully considered and selected a school that will meet the unique needs of the student. *See Glendale Unified Sch. Dist. v. Almasi*, 122 F. Supp. 2d 1093, 1107 (C.D. Cal. 2000). Conversely, an offer that fails to identify the school at which special educational services are expected to be provided may not be sufficiently specific for the parents to effectively

evaluate. *See Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) (explaining that despite district's contentions that its school for autistic children would have been an appropriate placement for the child, district did not offer that school when it did not make a formal, written offer to provide the child services at that school); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001) (similar).

Here, we hold as a matter of law that because it failed to identify a particular school, the IEP was not reasonably calculated to enable A.K. to receive educational benefits. *See Rowley*, 458 U.S. at 207. Indeed, this case presents an excellent example of the circumstances under which inclusion of a particular school in an IEP can be determinative of whether a FAPE has been offered. The parents agree that an *appropriate* private day school could provide a FAPE; they favor keeping A.K. at Riverview only because they have not found a private day school in their area that could meet A.K.'s specialized needs. Yet, the IEP development process concluded without any significant discussion of whether such a school existed, or if it did, how it would be a satisfactory match for A.K. Although Sullivan mentioned during an IEP meeting that Kellar and Phillips would be possible placements, the IEP team had never considered whether these particular schools would be able to satisfy A.K.'s specialized needs. Indeed, IEP team member Jill Cohen, an ACPS autism resource specialist, acknowledged at the due process hearing that when she signed the IEP recommending private day school she had no knowledge of any specific private day schools being considered.

That ACPS proceeded to submit applications on A.K.'s behalf to five different private day schools, at least two of which indicated, without even meeting A.K., that they could not satisfy his specialized needs, only highlights the need for the IEP team and the IEP to identify a particular school. With the IEP not identifying any particular school (because the IEP team had not discussed the issue), the parents were left to fend for themselves to determine whether any private day school in their area--including the five ACPS applied to--would be a satisfactory fit. This is not how the IDEA was designed to work. *See Glendale*, 122 F. Supp. 2d at 1107 (noting that a failure to identify a particular school places "an undue burden on a parent to eliminate potentially inappropriate placements, and makes it more difficult for a parent to decide whether to accept or challenge the school district's offer").[9] Rather, "[a]fter discussing the advantages and disadvantages of various programs that might serve the needs of a particular child," it is incumbent on the school district to utilize its expertise to "clearly identify an appropriate placement from the range of possibilities." [10] *Id.* at 1108.

In finding that ACPS offered A.K. a FAPE, the district court erroneously relied on the premise that "ACPS made a placement offer both at the Phillips School and the Kellar School." *A.K.*, 409 F. Supp. 2d at 694. In evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself. *See Z.P.*, 399 F.3d at 306 n.5; *Knable*, 238 F.3d at 768. *But cf. MM ex rel. DM v. Sch. Dist.*, 303 F.3d 523, 535 (4th Cir. 2002) (evaluating proposed IEP when parents' lack of cooperation prevented IEP team from finalizing the IEP). Expanding the scope of a district's offer to include a comment made during the

IEP development process would undermine the important policies served by the requirement of a formal written offer, namely, "creating a clear record of the educational placement and other services offered to the parents" and "assist[ing] parents in presenting complaints with respect to any matter relating to the educational placement of the child." *Knable*, 238 F.3d at 768 (internal quotation marks & alteration omitted). Especially in this case, in which the parents had tried in vain to find a local private day school that could meet A.K.'s specialized needs, the offer of an unspecified "private day school" was essentially no offer at all. [11]

We emphasize that we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided. There is no reason for us to frame the issue so broadly. [12] But, certainly in a case in which the parents express doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP describes, the IEP must identify such a school to offer a FAPE.

Our determination that the school district failed to offer a FAPE does not resolve the parents' reimbursement claim, however. The claim remains unresolved because the district court has not made findings regarding the appropriateness of A.K.'s placement at Riverview. *See Z.P.*, 399 F.3d at 311. Thus, we remand to the district court for further proceedings consistent with this decision. *See id.*

III.

In sum, we reverse the grant of summary judgment against the parents and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

Footnotes

1The district court found that "[p]rivate day school placement is a term of art describing an educational program which includes several characteristics such as a small overall student body size, small classes, small facility, extensive clinical support, the ability to work individually with a student, extensive behavioral management, and parental involvement." *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 409 F. Supp. 2d 689, 693 (E.D. Va. 2005).

2On July 2, the parents signed the IEP only as it related to the extended school year (ESY) services to be provided for A.K. in the summer of 2004 but continued to refuse to accept the plan with regard to the 2004-05 school year.

3An Ivymount representative informed Sullivan that the school did not have space available for A.K. A.K.'s mother testified, however, that the same representative also told her that Ivymount's program would not have been appropriate for A.K. in any event.

4She had toured both previously in her attempts to find an appropriate local private day school for A.K.

5The parents also challenged the adequacy of the services described in the IEP, contending that A.K.

needed more than one hour of private counseling per week, that needed transition services were not adequately specified, and that certain supplemental services were not properly described. The parents further argued that ESY services included in the IEP for July 1, 2004 to August 1, 2004 were never provided. These claims were also raised before the district court; however, they are not germane to this appeal.

6On the issue of placement with violent students, Sullivan testified that she believed Phillips would be able to group students to accommodate their varying needs.

7The parents actually characterize this as both a procedural and a substantive violation of the IDEA. However, because we view this claim as an alleged deficiency in what ACPS was offering rather than in the procedure by which the offer was developed or conveyed, we consider the alleged violation to be substantive. *See Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 767-70 (6th Cir. 2001) (considering the question of whether the IEP offered an appropriate program to be substantive). *But cf. MM ex rel. DM v. Sch. Dist.*, 303 F.3d 523, 533-35 (4th Cir. 2002) (holding that failure of the school district to finalize an IEP prior to the beginning of the school year was a procedural defect). The dissent appears to assert that the failure of the IEP to identify a particular school was a procedural violation subject to harmlessness analysis rather than a substantive violation because the parents would have sent A.K. to Riverview no matter what ACPS offered. *See post*, at 17-20. This argument conflates the question of whether a violation is merely procedural--and thus subject to

harmlessness analysis--with the harmlessness analysis itself. Under the dissent's logic, even a complete failure by a school district to offer--formally or informally--any alternative to the parents' favored educational plan would amount only to a harmless procedural error if the district could establish that the parents would not have been receptive to the district's offer.

The parents also contend that the district court erred in granting judgment against them because ACPS failed to meet the procedural requirements of the IDEA. In particular, they argue that ACPS failed to provide them with a description of the proposed change--from Riverview to a private day school--prior to the IEP meetings. Regardless of whether the district court addressed this issue, because the issue was apparently never raised to the hearing officer, we do not address it. *See David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 424 (1st Cir. 1985) ("[F]or issues to be preserved for judicial review they must first be presented to the administrative hearing officer."). In any event, in light of our holding that A.K.'s IEP was not reasonably calculated to enable A.K. to receive educational benefits, the notice issue is not material to our decision.

8That the order on review here is nominally one for summary judgment does not preclude our application of the clear error standard to what are essentially factual findings following a bench trial. *See Z.P.*, 399 F.3d at 309 n.7.

9We note that in *MM*, the school district had agreed to provide special education services at either of two different schools and we nonetheless held that the district had offered a FAPE. *See MM*, 303 F.3d at 535.

The opinion there, however, provides no indication that the parents objected to the particular schools at issue or argued that the school district should have identified a single school. *See id.*

10That is not to say that a change in the school where services were to be provided would constitute a change in placement. Rather, a change in school constitutes a change in placement only if the change "result[ed] in a dilution of the quality of [the] student's education or a departure from the student's LRE-compliant setting." *AW*, 372 F.3d at 682.

We emphasize that the IEP-development process is a cooperative one. Thus, if the school district identifies several schools during that process that it believes would serve the needs of the child, parents will have the opportunity to voice their preference before the IEP is finalized.

11For this reason, the dissent's contention that despite the fact that no location was included in the IEP, the parents knew "with a reasonable degree of certainty" where ACPS proposed to educate A.K. is not dispositive. *Post*, at 18. The contention is also factually suspect considering that although Sullivan mentioned that Kellar and Phillips would be possibilities for A.K., she never indicated that the district would not consider other schools as well (as it did when it sent applications to three other schools).

12The dissent's characterization notwithstanding, we do not "acknowledge[] that the failure to identify the location of the provision of special education services on a student's IEP need not always result in the denial of a

FAPE." *Post*, at 17. We merely note that we need not decide that issue today.

DISSENT BY: GREGORY

DISSENT

GREGORY, Circuit Judge, dissenting:

Today the majority mistakenly concludes that an inconsequential procedural error denied a disabled student of the opportunity for a FAPE. Of equal concern, the majority blurs the already indistinct line between procedural and substantive errors in the preparation of IEPs, documents that are of singular importance to the proper operation of the IDEA. The IEP that ACPS prepared for A.K. was flawed--it did not include the location at which A.K. would receive special educational services--but the flaw was merely procedural and did not deny A.K. a FAPE. Because I believe the school district's error was harmless, I respectfully dissent.

I.

In cases in which a student claims he was denied a FAPE, we first inquire into whether the school district complied with the procedural requirements of the IDEA. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). Even if ACPS violated one or more of the IDEA's procedural requirements, A.K. may have received an acceptable opportunity for a FAPE. *See DiBuo v. Bd. of Educ.*, 309 F.3d 184, 190 (4th Cir. 2002) (ruling that a procedural violation of the IDEA cannot deny a disabled child a

FAPE when the violation does not interfere with the provision of a FAPE to that child); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990). If A.K. did not lose an educational opportunity as a result of the procedural error, he was not denied a FAPE. *See DiBuo*, 309 F.3d at 190.

The majority is correct that A.K.'s IEP did not meet the IDEA's requirements. Specifically, the IEP did not specify the anticipated location at which the school district would provide special education services to A.K. The IDEA requires that an IEP include "the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications . . . ." 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (Supp. 2004). The statute does not define *location* as it is used in § 1414(d)(1)(A)(i)(VII), but the term must refer to something other than an educational placement, something more akin to a particular geographic locale. Section 1414(d)(1)(A)(i)(VII) concerns itself with some of the logistical considerations parents might have when making a decision regarding their child's education. The projected starting date, frequency, location, and duration of the child's educational sessions are relevant to practical concerns like scheduling the child's day and arranging for the child's transportation. *See White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003) ("The provision that requires the IEP to specify the location is primarily administrative . . . .").

This understanding of *location* is consistent with our precedent. When defining *educational placement* as it is used in the IDEA's "stay put" provision, we

repeatedly distinguished *educational placement* from *location*. *See A.W. v. Fairfax County Sch. Bd.*, 372 F.3d 674, 681-83 (4th Cir. 2004). Concluding that *educational placement* referred to an "instructional setting," this Court emphasized that the placement did not refer to the "precise location of that setting" or the "precise physical location where the disabled student is educated." *Id.* at 683, 681. As it is used in the IDEA (and in common parlance), then, *location* refers to something geographic in nature: a place or locale. This understanding is consistent with the notion that § 1414(d)(1)(A)(i)(VII) deals with practical, logistical considerations.

A.K.'s 2004-2005 IEP contains a chart with a column labeled "LOCATION OF SERVICES." That column bears the solitary entry "SpeEd [illegible]," in reference to the type of education A.K. would receive, not the location at which he would receive it. Thus, A.K.'s IEP was flawed.[1] ACPS's error, however, was only procedural.

There is no bright line distinguishing all the "procedural" requirements of the IDEA from its "substantive" requirements.[2] If such a line could be drawn, it might be done by looking to the consequences of the violation of the IDEA requirement in question. The violation of a substantive requirement results, of necessity, in the denial of a FAPE, whereas the violation of a procedural requirement does not, *see DiBuo*, 309 F.3d at 190. More than once the majority acknowledges that the failure to identify the location of the provision of special education services on a student's IEP need not always result in the denial of a FAPE. *See ante* 12, 14. This concession supports the

conclusion that the requirement that a school district give an anticipated location on the IEP is only procedural. But then the majority states without explanation that it "views [A.K.'s] claim as an alleged deficiency in what ACPS was offering rather than in the procedure by which the offer was developed or conveyed" and therefore considers the ACPS's violation to be substantive. *Ante* 9 n.7. It is not. ACPS erred, but that error was procedural.

II.

ACPS's error did not deny A.K. a FAPE. In *DiBuo*, this Court asked "[w]hether a procedural violation of the IDEA can support a finding that a school district failed to provide a disabled child with a FAPE when the procedural violation *did not actually interfere* with the provision of a FAPE to that child." 309 F.3d at 190. The answer to the question, we said, is no. *Id. DiBuo* and the cases it cites make clear that something more than a simple procedural violation must exist in order for an aggrieved student to prevail in this sort of appeal: the violation must result in some loss of educational benefit or opportunity and cannot simply be a harmless error. *See id.* Here A.K. lost no educational opportunity and therefore was not denied a FAPE.

As the district court pointed out, ACPS recommended both the Phillips and Kellar schools as options for A.K. during the June 9 IEP meeting. *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 409 F. Supp. 2d 689, 693 (E.D. Va. 2005). Whether or not there was extensive discussion of the schools during the meeting, Susan Sullivan named the schools as possible locations at which A.K. might be educated. In A.K.'s case, this oral

notice was equivalent to the written notice the IDEA requires: after Sullivan's suggestions were made, A.K.'s parents knew with a reasonable degree of certainty where ACPS proposed to educate their child the following school year. The Phillips and Kellar schools were the only ones named as possibilities by ACPS until the school district sent A.K.'s information to several other private day schools on July 6, and during the IEP meeting, A.K.'s parents understood them as such.

The majority discounts the mention of these two schools because, it says, the IEP team had never considered whether those particular schools would be able to satisfy A.K.'s needs. *See ante* 12-13. This objection has no bearing on the question whether ACPS's failure to specify a location on the IEP harmed A.K. The majority's principal concern is that A.K.'s parents had no idea where their child was likely to receive special education services, placing upon them the "undue burden" of investigating any number of potential placements. *See ante* at 12. But A.K.'s parents did know where he would likely receive special education services: the Phillips School or the Kellar School.

Even if the decision-making process was relevant to the question of notice, there was no defect in the manner in which ACPS selected the Phillips and Kellar schools as possibilities. Sullivan, who suggested the schools at the June 9 meeting, was ACPS's private placement specialist and had nearly thirty years of experience in the special education field. It was her job to place needy students in private day or residential schools. She visited schools (including Phillips and Kellar) and

worked with teachers and parents to ensure successful placements. She knew A.K.'s case well and had placed other students in both the Phillips and Kellar schools before. Her recommendations for A.K. were of precisely the sort it was her job to make. The IDEA does not govern the process by which she must arrive at her recommendations, and I find no problem with either her reliance upon her expertise or her ultimate suggestions. *Cf.* § 1414(d)(3)(B) (listing factors IEP team must consider while developing IEP).

The IDEA does not require that an IEP identify the definitive location for the provision of a child's special education services; the IEP need only supply the anticipated location. § 1414(d)(1)(A)(i)(VII). In A.K.'s case, the IEP did not, but ACPS suggested two potential locations during the June 9 meeting.[3] If A.K.'s parents wished to challenge the suitability of either school, they could have done so (and did), but the basis for their complaint ought not to have been that they were unaware of the anticipated location of services. Because A.K.'s parents were given notice that the Phillips and Kellar schools were locations under consideration, ACPS's failure to write this information on his IEP did not deny A.K. of an educational opportunity.

Perhaps more important than the notice provided in the June 9 IEP meeting is the apparent determination of A.K.'s parents to keep him at Riverview no matter the outcome of the IEP proceedings. *See MM ex rel. DM v. Sch. Dist.*, 303 F.3d 523, 535 (4th Cir. 2002) (finding procedural error harmless in part because there was no evidence parents would have accepted FAPE offered by school district). Before the 2004-2005 IEP

development process even began, A.K.'s parents signed a contract and paid a deposit for A.K. to return to Riverview for the summer of 2004 and the 2004-2005 school year.[4] A.K.'s mother testified that she was unwilling to bring A.K. back from Riverview, where he was attending a summer program, without a "specific placement" in Alexandria being identified first. Apparently this unwillingness extended even to trips home that might help identify that "specific placement": both Phillips and Kellar requested interviews with A.K. during the summer in order to determine conclusively whether they could give him the assistance he required, but A.K.'s parents never brought him home to attend those interviews. A.K.'s mother testified that when the Phillips and Kellar schools were named as potential locations in the June 9 IEP meeting, she already had determined that both schools were inappropriate for her son. She understood those schools were suggested locations; she simply disagreed with their selection. It is difficult to understand how A.K. could have lost educational opportunity on account of the omission of the schools' names from his IEP when his parents understood both schools were under consideration and had already expressed that neither was appropriate for their son.

Finally, the Hearing Officer's decision indicates that the parents had no objections to the notice the IEP provided at the time of A.K.'s due process hearing. Any procedural violations pertaining to the IEP's notice function, then, were considered harmless by the parents (or at least, harmless enough that the parents chose not to raise the issue before the Hearing Officer). In short, A.K. was denied no educational opportunity as a result of ACPS's failure to list an anticipated location

for his education on his 2004-2005 IEP. Without a denial of an educational opportunity, A.K. could not have been denied a FAPE by the error. *See DiBuo*, 309 F.3d at 190.

III.

The second component of the reviewing court's inquiry regards substantive compliance with the IDEA. It is intended to ensure that the IEP developed is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. In this case, the Hearing Officer found that private day placement would "assist AK in his transition into the local community, and constitute the least restrictive environment for him." A residential program like Riverview, the Hearing Officer concluded, was not required by the IDEA because it "merely enhance[d] an otherwise sufficient day program."

Before reaching this conclusion, the Hearing Officer heard the testimony of educational experts presented by both parties on topics including the appropriateness of the Phillips and Kellar schools for A.K. *See A.K.*, 409 F. Supp. 2d at 694-95. ACPS presented Sullivan, who had visited both schools many times. She offered testimony about both schools and how A.K. would fit in at each based on her knowledge of the schools and A.K.'s needs. ACPS also presented Cara Jill Cohen, its autism resource specialist and an expert in special education. Cohen had observed A.K. in a variety of school settings, including at Riverview, and had worked with Sullivan on A.K.'s IEP team. She was involved in the decision to recommend a private day school for A.K. and believed that his needs could be met by one. The

Hearing Officer also heard the testimony of Laura Heyer, the program supervisor of the high school combination program at Phillips, who described the school and its programs in detail. She testified on the basis of her experience and A.K.'s records, which were sent to her in July 2004, that she saw nothing about A.K.'s case to suggest that Phillips could not adequately serve his needs. In opposition, A.K.'s parents presented two experts who opined that A.K. could not properly be served at a private day school like Phillips or Kellar, but neither expert had more than the shallowest of acquaintances with either school.

The Hearing Officer's findings, including the finding that the Phillips or Kellar school were sufficient to meet A.K.'s needs, are entitled to a presumption of correctness. *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004). The evidence in the record does not rebut the presumption in this case. A.K.'s mother may not have cared for Phillips or Kellar, but the evidence indicates that the schools adequately would have attended to A.K.'s educational needs. As this Court has said before, the "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parents." *A.B.*, 354 F.3d at 328. ACPS provided A.K. with the opportunity for a FAPE and therefore has no obligation to bear the cost of his private school education during the 2004-2005 school year. *See* 20 U.S.C. § 1412(a)(10)(C)(i).

IV.

Despite committing a procedural error in the preparation of his IEP, ACPS provided A.K. with the opportunity for a FAPE. Consequently, he is not

entitled to reimbursement of his Riverview tuition or the remand granted by the majority. I am disappointed that my colleagues today punish a school district for a harmless oversight. Had ACPS simply written the names of the candidate schools on A.K.'s IEP there would be no basis for complaint. In this case, A.K. has a legitimate complaint, but because he lost no educational opportunity as a result of ACPS's oversight, the IDEA affords him no remedy. The district court's decision should be affirmed.

Footnotes

1I note that in IEPs developed for A.K. in previous years, the "LOCATION OF SERVICES" column contained such entries as "Special Edu," "General Edu," "Consult," and "regular." These descriptions, whatever their value, do not satisfy the IDEA's requirement that the school district list the anticipated location of services in the IEP. They did, however, satisfy A.K.'s parents: A.K.'s mother signed IEPs that did not specify location for both the 2002-2003 and 2003-2004 school years without objection on this point.

A.K.'s mother signed the 2003-2004 IEP as part of a settlement agreement between the parents and ACPS. Under the terms of the agreement, the parents consented to the "private day school placement" designated in the IEP in exchange for ACPS's partial funding of A.K.'s education at Riverview that year. Then, as now, the parents' true complaint was that A.K. should be at Riverview and not in private day placement at all. Unfortunately, ACPS refused to subsidize A.K.'s Riverview education for the 2004-2005 school year and presented ample evidence during the

2004 due process hearing to justify its choice of private day placement for A.K. To obtain funding for their preferred school a second time, the parents are left with a claim that a procedural oversight denied A.K. some educational opportunity.

2Although 20 U.S.C. § 1415 addresses itself specifically to procedural safeguards, we have found several of the requirements listed in § 1414 to be procedural as well. *See, e.g., DiBuo*, 309 F.3d at 187, 190-92; *MM ex rel. DM v. Sch. Dist.*, 303 F.3d 523, 535 (4th Cir. 2002).

3As the majority acknowledges, *see ante* 12 n.9, this Court has upheld the validity of an IEP in which a school district promised to provide special education services at one of two different locations, *see MM*, 303 F.3d at 529, 535. Although the number of schools suggested on the IEP was not at issue in that case, *MM* lends support to the proposition that a school district may suggest more than one school and still satisfy its obligation to write the anticipated location of the provision of services on an IEP. A multiplicity of suggested locations may well place an "undue burden" on the parents (as might suggesting no school at all), but two schools hardly constitute a multiplicity. I am troubled that the majority is willing to punish a school district for acknowledging that more than one school may appropriately serve a child's needs. Given that neither of the two suggested schools had met with A.K. personally (as each needed to do before finally determining whether it could adequately serve him), it would serve no purpose to force ACPS arbitrarily to suggest one over the other in the IEP. 4A.K.'s father pointed out that the deposit was to reserve A.K.'s spot at Riverview and that the parents had not yet given

any "substantive funding" to Riverview at the time of the IEP meetings. The $ 5,700 deposit accompanied a document entitled "Reservation and Enrollment Agreement," signed April 8, 2004, by A.K.'s parents that set out the terms and conditions of A.K.'s education at Riverview for the 2004-2005 school year. Such a deposit might have served only as a safety net intended to catch A.K. should negotiations with ACPS fall through or lead to the conclusion that Riverview was the appropriate placement. On the other hand, the deposit and enrollment agreement are also consistent with an intent to keep A.K. at Riverview no matter the outcome of the IEP proceedings.

Civil Action No. 05-229
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION

A.K., by his Parents and Next Friends J.K. and E.S.,
Plaintiffs,

vs.

ALEXANDRIA CITY SCHOOL BOARD,
Defendant.

December 20, 2005, Decided
December 20, 2005, Filed

JUDGES: Gerald Bruce Lee, United States District Judge.

OPINION BY: Gerald Bruce Lee

OPINION

MEMORANDUM ORDER

THIS MATTER is before the Court on Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Judgment on the Administrative Record. This case involves a family's attempt to seek reimbursement under the Individuals with Disabilities Education Act, *20 U.S.C. § 1400 et. seq. (2000)* ("IDEA"), from a public school system for the costs of their child's private school tuition. The issue before the Court is whether the defendant school system offered the plaintiff child a "free appropriate public education" ("FAPE") that was

reasonably designed to provide the child with an educational benefit. Upon review of the submissions and arguments of the parties, this Court holds that the defendant school system did offer the plaintiff child a free appropriate public education. Plaintiffs refused the offer and, instead, elected to place the child in an out-of-state residential private school. Therefore, Plaintiffs are not entitled to reimbursement for the costs of the plaintiff child's out-of-state residential private school tuition. Accordingly, Summary Judgment is GRANTED in favor of the defendant school system.

I. BACKGROUND

Plaintiff A.K. (the "Student") is a special education student who attended Alexandria City Public Schools ("ACPS," "school system") from Kindergarten through seventh grade. Def.'s Brief in Supp. of Mot. for J. on the Admin. Rec. at 2 (hereinafter "Def's. Br. Admin. Rec."). Beginning in preschool, the Student was found to be eligible for special education services under IDEA, and he began receiving such services at that time. *Id.* Plaintiff was attending Hammond Middle School, a regular public school in Alexandria, for seventh grade (2002-03 school year) when he began to experience some difficulties in his behavior and in getting along with other students. *Id.* at 3. The Hammond Staff met with A.K. and his parents (the "Parents") on numerous occasions in an effort to help A.K. work through the problems he was then experiencing. *Id.* In March, 2003, an eligibility committee determined that A.K. continued to be eligible for special education services, however the committee determined for the first time that he had multiple disabilities based on his numerous educational needs. *Id.* at 4; Transcript of Due Process

Hearing, September 13, 2004 (hereinafter "Tr."); Administrative Record 102 at 37 (hereinafter "A.R."). Thereafter, ACPS prepared an Individualized Education Program ("IEP") for A.K., as required by the IDEA, for the 2003-04 academic year to which the Parents agreed on June 5, 2003. Def's. Br. Admin. Rec. at 4. ACPS proposed placement for A.K. in a therapeutic private day school setting within his local community for his eighth-grade year. *Id.;* A.R. at 28-29. The Parents disagreed with that recommendation and, instead, enrolled A.K. at Riverview School, a private residential school outside of Cape Cod, Massachusetts. Def's. Br. Admin. Rec. at 4.

An IEP team, consisting of ACPS staff, the Parents, and staff from Riverview, met for approximately three (3) hours each on May 21, May 29, and June 9, 2004, to discuss and draw up an IEP for A.K. for the 2004-05 school year. *Id.* at 5. That IEP contained a lengthy discussion of the Student's present level of performance, agreed goals and objectives, and a transition plan. *Id.;* A.R. at 30. However, the Parents and the school system could not come to agreement on the issue of A.K.'s placement. Def's. Br. Admin. Rec. at 5. To implement the IEP, the school system proposed placement in a local therapeutic private day school setting which would allow the Student to transition back to his community from his out-of-state residential placement. *Id.* Although the Parents did not agree with the placement recommended by the IEP, the school system sent applications on the Student's behalf to several local private day facilities. *Id.* at 7. Subsequently, two local private schools, the Phillips School and the Kellar School, indicated that they believed they had an appropriate program for the

Student and invited A.K. and his parents to visit their facilities and to interview. *Id.*; A.R. 102, Sullivan Tr. at 154. A.K.'s mother visited the Phillips School in July, 2004, however she did not bring the Student for the required interviews at either school because she determined that neither school could satisfy A.K.'s educational needs. Def's. Br. Admin. Rec. at 7-8. The Parents then re-enrolled A.K. at the Riverview School in Massachusetts for the 2004-2005 school year and later sought reimbursement for expenses incurred therein, arguing that ACPS had failed to provide A.K. with a FAPE as required by the IDEA. *Id.*

Subsequently, an independent Hearing Officer heard the Parents' claim for reimbursement during a three-day administrative proceeding. *Id.* at 14. The Hearing Officer concluded that ACPS did provide the Student with a FAPE since the school system had offered the Student an appropriate and educationally-beneficial special education program in a private day school in his local community. *Id.* at 14-15; A.R. 117. The Hearing Officer also concluded that the Student's IEP included the required offer of a proposed placement and did not need to identify a specific school facility for the Student to attend. Def's. Br. Admin. Rec. at 14-15. Therefore, the Hearing Officer denied the Parents' claim for reimbursement of the costs of sending A.K. to the Riverview School in Massachusetts. *Id.*

The Parents filed suit in this Court against ACPS alleging that the school system did not provide A.K. with a FAPE, and that they are entitled to reimbursement for the cost of sending A.K. to the Riverview School. ACPS has moved for Judgment on

the Administrative Record and the Parents have filed a cross-Motion for Summary Judgment.

II. ANALYSIS

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that a motion for summary judgment will be granted if it is shown that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).* Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).* Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* The moving party is entitled to judgment as a matter of law unless a fair-minded jury could return a verdict for the nonmoving party on the evidence presented. *See id. at 247-48.*

A district court reviewing a state administrative decision under IDEA may grant summary judgment based upon the administrative record. *See, e.g., DeLullo v. Jefferson Co. Bd. of Educ., 71 F. Supp.2d 554 (N.D. W. Va. 1998), aff'd, 194 F.3d 1304 (4th Cir. 1999).* The court should make an independent decision based on a preponderance of the evidence, yet give due weight to the state administrative findings. *See School*

Committee of Town of Burlington v. Department of Educ. of Mass., 471 U.S. 359, 369, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985); *Doyle v. Arlington County Sch. Bd., 953 F.2d 100, 105 (4th Cir. 1992)*. In particular, the reviewing court should consider the factual findings in an IDEA agency decision to be prima facie correct. *See Kirkpatrick v. Lenoir County Bd. Of Educ., 216 F.3d 380, 385 (4th Cir. 2000)*. In cases where the Hearing Officer and the Reviewing Officer's findings are in accord, even greater deference is due to the administrative findings. *See Combs by Combs v. School Bd., 15 F.3d 357, 361 (4th Cir. 1994)*. The party seeking to overturn a state administrative officer's decision bears the burden of proof in showing that the decision was erroneous. *See Barnett v. Fairfax County School Bd., 927 F.2d 146, 152 (4th Cir. 1991)*; *cf. Schaffer v. Weast, 546 U.S. , 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005)* (holding that under IDEA the burden of persuasion in a due process hearing challenging an IEP lies with the party seeking relief).

Judicial review of a state hearing officer's decisions under IDEA is two fold. *See Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)*; *Barnett, 927 F.2d at 151*. First, the court must inquire whether the state complied with the procedures set forth under IDEA. *See Rowley, 458 U.S. at 206*. Second, the court must inquire whether the IEP developed through IDEA's procedures are reasonably calculated to enable the child to receive educational benefits. *See id. at 207*. Under the first prong, the court must determine whether the state has adopted a state plan, policies, and assurances as required by IDEA, then it must determine whether the state has created an IEP for the child in question

which conforms to the requirements of a FAPE. *See id. at 207 n.27.*

B. Compliance under IDEA

1. Procedural Compliance

ACPS complied with the procedures required under IDEA sufficient to ensure that A.K. received a FAPE. Only procedural violations that result in a loss of an educational opportunity to the student, or that seriously infringe on the parent's opportunity to participate in the IEP process, constitute a denial of a FAPE. *See Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990)* (stating that the procedural violation must result in a loss of an educational opportunity); *Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985)* (showing that the procedural violation must not deny parents the opportunity to participate in the IEP process); *see also W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1484 (9th Cir. 1992)* (acknowledging both propositions). The Parents argue that they were unable to have meaningful participation in the IEP process based on the following three procedural violations which they maintain operated to deny A.K. a FAPE: (1) the Parents had never been notified that private placements in the area would be considered, (2) "specific programs were not disclosed by ACPS at the IEP meeting," and (3) "no clear picture had been presented as to what services were available and how they [would] be provided to A.K." Pl.'s Brief in Supp. of Mot. for Summ. Jud. at 17 (hereinafter "Pl.'s Brief"). The Court will address each of these allegations in turn.

a.) Notification that Placements in the Area Would be Considered

ACPS did not deny A.K.'s parents a meaningful opportunity to participate in the IEP process because the Parents were on notice that the ACPS had considered private placements in the area for A.K. The Parents argue that A.K. was denied a FAPE because they were not notified that private placements in the area would be considered until that matter was first discussed during the final thirty minutes of the final IEP conference call on June 9, 2004. Pl.'s Brief at 16. They maintain that the late and sudden notification that private placements in the area were being considered "left the parents without any meaningful basis to participate in the discussion." *Id.*

The Court rejects this argument because the record clearly indicates that the parents knew, or should have known, that ACPS considered private placements in the area to meet A.K.'s needs well in advance of the June 9, 2004, conference call. ACPS had recommended a "Level II Private Day Placement" for A.K. in its proposed IEP for the 2003-04 school year, an IEP which the Parents received and signed. A.R. 28 at 1; Def.'s Brief in Opp. to Pl.'s Mot. for Summ. J. at 1 (hereinafter "Def.'s Brief"). A recommendation for "Level II Private Day Placement" was also written on the 2004-05 IEP on which the Parents wrote, "I . . . disagree to regular school year placement." Def.'s Brief at 1-2; A.R. at 1. This record clearly indicates that the Parents had more than adequate notice that ACPS considered private day placement in the area to be appropriate for A.K. Therefore, this recommendation did not come as a surprise to them and did not deprive them of a

meaningful opportunity to participate in the IEP process.

b.) Disclosure of "Specific Programs" at the June 9, 2004 IEP Meeting

ACPS did not deny A.K. a FAPE because the school system was not required to identify in writing any *specific* private school for the Student's placement in order to satisfy the requirements of the IDEA. The Parents contend that ACPS denied A.K. a FAPE based on its failure to "identify, discuss, and locate an appropriate private day placement during the EIP process." Pl.'s Brief at 17. This argument fails because, as this Court has held, "a recommendation for a child's educational placement means a recommendation to the actual educational program and not the particular institution where the program is implemented." *Jennings v. Fairfax Co. Sch. Bd.*, 35 IDELR 158 (E.D. Va. 2001), aff'd *39 Fed. Appx. 921, 2002 U.S. App. LEXIS 14372 (4th Cir. July 16, 2002)* (citing *Leonard v. McKenzie, 276 U.S. App. D.C. 239, 869 F.2d 1558, 1562-63 (D.C. Cir. 1989)* (acknowledging that an IEP is not location specific)). Thus, in order for the school system to make a proper recommendation for placement, the school system must make a written recommendation of a specific educational program for the child. *See generally Leonard, 869 F.2d at 1563.* ACPS complied with this procedural requirement. During the June 9 conference call, ACPS recommended a private day school placement for A.K. and specifically mentioned the Kellar School and the Phillips School as options. Private day school placement is a term of art describing an educational program which includes several characteristics such as a small overall student body size, small classes, small facility, extensive clinical

support, the ability to work individually with a student, extensive behavioral management, and parental involvement. Therefore, the June 9, 2004, recommendation to place A.K. in a private day school complied with the IDEA's procedural requirements for a written education placement offer.

c.) Description of Available Services and How They Would be Provided to A.K.

ACPS did not deny A.K. a FAPE because, as the Hearing Officer concluded, the services required by A.K. were sufficiently set out in, or contemplated by, the IEP. In response to the Parents' contention that the supplemental and transitional services to be provided to A.K. were not specifically set forth in the IEP, the Hearing Officer stated,

> It is my opinion that the potential problems to be encountered by the transition to private day placement, such as stress, different environment, confusion, etc., are to be met with such supplemental services as counseling and therapy, which are set forth in the IEP. Thus, it is not necessary for the IEP to presume what transition problems A.K. may encounter, then describe what services will be provided to combat them. This is too inflexible an approach.

A.R. 117 at 25-26 (emphasis added).

Similarly, when the Parents alleged a procedural violation based on ACPS's failure to provide A.K. with extended school year ("ESY") services from July 1

through August 1, 2004, the Hearing Officer concluded that the lack of provision of these services "was simply the result of a miscommunication between the parties, and does not entitle the parents to reimbursement of A.K.'s summer school expenses at Riverview in 2004." A.R. 117 at 26. As mentioned, this Court must consider the factual findings in an IDEA agency decision to be prima facie correct. *See Kirkpatrick, 216 F.3d at 385.* Here, there is insufficient evidence to rebut this presumption, particularly in light of the fact that the parents only agreed to the portion of the IEP dealing with ESY services on July 2, 2004 leaving ACPS little time to secure those services for A.K. during the aforementioned period which began on July 1, 2004. Furthermore, by July 11, 2004, A.K. was already out of the area and again attending Riverview School, which would have further hindered any effort to provide ESY services during this time. Def's. Br. Admin. Rec. at 10. Therefore, the Court concludes that, on these facts, the failure of ACPS to provide ESY services to A.K. during this period was not a procedural violation of the IDEA and did not operate to deny A.K. a FAPE.

2. Substantive Compliance

ACPS offered A.K. a FAPE. A FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *See Rowley, 458 U.S. at 188-89.* This standard is satisfied when the state provides personalized instruction with sufficient support services to permit the child to benefit educationally from that institution. *See id. at 187.* As explained above, in June, 2004, ACPS recommended

that A.K. be placed in a private day school. In addition, during that time, ACPS made a placement offer both at the Phillips School and the Kellar School. The Hearing Officer found that private day school placement would be appropriate because it was reasonably calculated to offer A.K. educational benefits. A.R. 117 at 26-27. The record supports the Hearing Officer's finding. The recommended private day schools offered small classes, extensive individual attention, structure and clinical support, as well as experienced staff trained in special education and emotional disabilities. The Phillips School is a private day school located in Annandale, Virginia that serves students with a variety of disabilities, including students with learning disabilities, attentional issues, and social interaction difficulties. Def's. Br. Admin. Rec. at 8 (citations omitted). The Phillips School provides a highly-structured, team-oriented environment for its students and features a full-time language therapist, occupational therapist, counseling staff, behavioral staff, vocational staff, and two reading specialists. *Id.* Similarly, the Kellar School is a fifty-student "therapeutic day school" located in Fairfax, Virginia that offers a "structured, individualized educational program in a supportive environment." *Id.* at 10 (citations omitted).

The Parents cite the opinions of two experts familiar with A.K., Ms. Cheryl Wietz and Dr. William Stixrud, to support their contention that neither placement program was sufficient to provide A.K. with an appropriate education. Pl.'s Brief at 20-27. The Hearing Officer considered the testimony of these experts as well as the testimony of several ACPS officials who were familiar with A.K., including Susan Sullivan, a Private Placement Specialist, and Cara

Cohen, an Autism Resource Specialist. In contrast to the experts presented by the Parents, the ACPS officials testified that a private day placement was appropriate for A.K. and that either the Phillips School or the Kellar School could successfully implement A.K.'s 2004-2005 IEP. A.R. 117 at 14-15, 18-20. In reviewing the record, the Court finds sufficient evidence to support the Hearing Officer's conclusion that private day school placement would be appropriate for A.K., and that ACPS properly recommended such a placement. Therefore, ACPS offered A.K. a FAPE in compliance with IDEA.

C. Reimbursement under IDEA

The Parents are not entitled to tuition cost reimbursement from ACPS for sending A.K. to the Riverview School. Parents are entitled to retroactive reimbursement for sending their child to a private school only when the state denies their child a FAPE. *See 20 U.S.C. § 1412 (a)(10)(C); Burlington School Comm. v. Department of Educ., 471 U.S. 359, 369-70, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985); Leonard, 869 F.2d at 1560.* A.K.'s parents are not entitled to reimbursement for time at the Riverview School because ACPS offered A.K. a FAPE during the June, 2004 IEP meeting. Nonetheless, A.K.'s parents rejected this offer. The Parents' rejection of this offer is clearly evidenced by their declaration on the 2004-05 IEP stating that they did not agree with the recommendations proposed in the IEP. In addition, the testimony of A.K.'s mother affirms such rejection. A.K.'s mother unequivocally stated that she rejected the proposed June, 2004 IEP plan for private day placement. Accordingly, under *Carter* and *Leonard*, the

Parents are not entitled to reimbursement for tuition costs under IDEA for sending A.K. to the Riverview School for the 2004-05 school year. *See Florence County Sch. Dist. Four v. Carter by & Through Carter, 510 U.S. 7 at 15, 114 S. Ct. 361, 126 L. Ed. 2d 284; Leonard, 869 F.2d at 1560.*

III. CONCLUSION

For the foregoing reasons, this Court holds that ACPS complied with the requirements of IDEA, and properly offered the Parents a FAPE for A.K. The Parents unequivocally rejected the offers for a FAPE placement. Accordingly, it is hereby

ORDERED that Defendant's Motion for Judgment on the Administrative Record is GRANTED. It is further

ORDERED that Plaintiffs' Motion for Summary Judgment is DENIED.

The Clerk is DIRECTED to enter JUDGMENT in favor of Defendant Alexandria City School Board and against Plaintiffs A.K. by his Parents and Next Friends J.K. and E.S.

The Clerk is directed to forward a copy of this Memorandum Order to counsel of record.

Entered this 20th day of December, 2005.

/s/

Gerald Bruce Lee

United States District Judge

Alexandria, Virginia

12/20/05

No. 06-1130

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

A.K., a minor by his parents and next friends J.K. and E.S.,

Plaintiff-Appellant,

v.

ALEXANDRIA CITY SCHOOL BOARD,

Defendant-Appellee.

July 23, 2007, Order Filed; July 27, 2007, Dissent Filed

NOTICE: PUBLISHED

JUDGES: Gregory voted to rehear the case en banc, and Chief Judge Williams and Judges Wilkinson, Niemeyer, Michael, Motz, Traxler, King, Shedd and Duncan voted against rehearing en banc. GREGORY, Circuit Judge, dissenting from the denial of reharing and rehearing en banc.

OPINION

On Petition for Rehearing and Rehearing En Banc.

Appellee has filed a petition for rehearing and rehearing en banc.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Judge Gregory voted to rehear the case en banc, and Chief Judge Williams and Judges Wilkinson, Niemeye, Michael, Motz, Traxler, King, Shedd and Duncan voted against rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Senior Judge Wilkins for the Court.

DISSENT BY: GREGORY

DISSENT

GREGORY, Circuit Judge, dissenting from the denial of rehearing and rehearing en banc:

Because schools and parents in this circuit would benefit greatly from consideration by the whole court of the questions this case presents, I dissent from my colleagues' decision not to rehear this case en banc. In particular, it would be wise for us to articulate a standard for differentiating substantive and procedural requirements of the IDEA.

The panel majority concluded that the school district's failure to identify on A.K.'s IEP an anticipated location at which A.K. would be educated constituted a violation of the substantive requirements of the IDEA. The school district did violate the IDEA -- the law requires that an IEP identify the anticipated frequency,

duration, and location for the provision of educational services, and A.K.'s IEP specifies no location -- but I do not see the violation as a deficiency in the educational program the school district was offering, as the majority does. The school district's mistake is one that had no effect upon the education A.K. would receive. This, to me, is evidence that the error is not a substantive one.

Under our present jurisprudence, public school districts are vulnerable to those who could use the unclear state of the law to their advantage. In particular I worry that public schools could be liable for large sums because of errors that, as here, have no adverse impact on the quality of the educational program made available to the student. Regrettably, our public schools today face greater social challenges than before with ever shrinking financial resources; and we should be careful not to expose them to a greater burden than Congress intended them to bear.

The IDEA was written to ensure the fair treatment of disabled students by the educational system, a noble goal that is worthy of our vigilance, but not to punish a school district's good faith efforts to comply with the statute, even if those efforts sometimes entail technical but harmless errors.

105 LRP 13597
In re: Student with a Disability
Virginia State Educational Agency
N/A
September 25, 2004

Judge / Administrative Officer

Lawrence E. Lindeman

Full Text

Hearing Officer Decision
Preliminary

This matter was Instituted by a July 9, 2004 letter from William B. Reichhardt, Esq, on behalf of Dr.[ ] and Ms.[ ] , parents of [ ] , to the Virginia Department of Education requesting a due process hearing. Mr. Reichhardt averred that the 2004-2005 Individualized Educational Program (IEP) fails to provide [ ] with a free appropriate public education (FAPE) fails to provide a setting that gives him opportunities and interventions in academic, social, and daily living skills on a continuous and meaningful basis, falls to offer him any transitional services from a residential program to a private day program and fails to offer social skills as a part of the extended school year (ESY) services.

By letter dated July 15, 2004 the undersigned was appointed as hearing officer.

On July 26, 2004 a telephonic prehearing conference was conducted. Mr. Reichhardt appeared on behalf of the parents, and Mr. Cafferky appeared on behalf of [ ]

Public Schools [ ]. The parties agreed that the primary issue was the appropriateness of the IEP. Hearing was scheduled and held on September 13,14, and 16, 2004 at the [ ] facilities in [ ] Virginia.

In this decision exhibits introduced by the parents will be identified as "Ex" and exhibits introduced by [ ] will be identified as "Ex*. Transcript references to the September 13 hearing will be referred to as "DlTr", transcript references to the September 14 hearing will be referred to as "D2Tr" and transcript references to the September 16 hearing will be referred to as "D3Tr",

Statement of the Case

[ ] is a fifteen year old eighth grader currently attending school in [ ], Massachusetts. He has been eligible for special education services since he attended [ ] Elementary School in [ ] , Virginia (Ex I).

In May, 2000 [ ] concluded that [ ], a fourth grader at the time, continued to be eligible for special education services as a student with specific learning disabilities (Exs. 2 & 3). Thereafter, on June 15, 2000 an IEP was proposed for [ ] and agreed to by his parents. The IEP provided for a variety of special education services In math, spelling and language, social studies and science, It also provided for an assistant who monitored his academic and social endeavors and accommodations for test taking and classroom behavior. It established short term goals and objectives to be attained by [ ] during the following school year (Ex. 19).

One year later, June, 2001, another IEP was prepared for [ ]. This IEP reviewed [ ]'s history of learning

difficulties, and his past and present levels of performance, It concluded that [ ] had had a successful year as a fifth grader. He, with the monitoring of the assistant, participated In a contained math class, and in regular science and social studies classes. He was given speech-language services for approximately 90 minutes per week In his regular classroom. It noted that he continued to have difficulties in listening and following directions. His relationships with his peers increased during the course of the year. Again, the IEP set forth certain short term goals for [ ] to attain during the upcoming academic year { Ex, 205. In October, 2001, the IEP was modified to move [ ] from a regular science class to a self contained science class (Ex. 21).

In June, 2002, another 1EF was prepared for [ ]. This IEP found that he suffered from multiple disabilities, it concluded that while his social skills had improved, there were some areas, such as attentiveness, that need additional work. The IEP noted that he had been tested in January, 2002 to assess his current academic functioning. Generally speaking, his test results were in the lowest limits of average, or below average. Classroom accommodations and modifications for [ ] were continued, as was the assignment of a personal assistant. Short term goals for the upcoming school year were also established (Ex. 22). In the Fail of 2002 the 1EP was slightly modified to address certain concerns expressed by the parents regarding [ ]'s progress (EXs. 23, 24, 25; D1Tr. 38),

Another IEP was prepared for [ ] in June, 2003. in reviewing his performance for the previous year, the IEP present level of performance Indicated that [ ] continued to have significant deficiencies in reading,

writing, math, and social skills. Psychological evaluation reports of [ ] prepared in October and December, 2002 indicated that [ ] had borderline to average cognitive abilities. His cognitive strengths lie In his conceptual reasoning skills and his ability to make connections between objects and ideas. His cognitive weaknesses are verbal processings nonverbal/visual skills, attention, and executive functioning abilities. The achievement results from October and December, 2002 testing reveals [ ]'s strengths to be in the areas of reading decoding, math reasoning, and spelling. His weaknesses lie in the reading comprehension, written expression, and math calculations. [ ] continued to have a persona assistant assigned to him, and to have general and testing accommodations made for him. Short term goals for the upcoming school year were also established. In addition, in July, 2003 an Individualized Transition Plan, which set forth the goals for the transition services to be provided for [ ], was produced (Ex. 27), The IEP was amended to provide for the occupational therapy services and social studies class to be moved to a special education environment (Ex, 28).

An IEP was also prepared for the 2004-2005 school year, and a discussion of that IEP will be contained elsewhere in this decision.

At various times In the past [ ] has been diagnosed as having a non-verbal learning disability, multiple disabilities, Aspergers, pervasive developmental disorder (POD), semantic-pragmatic disorder, learning disabilities in all academic areas, speech/language delays, an attention deficit disorder (ADD), and being a

slow learner with specific learning disabilities {Ex. 4: DITr. 37,180; D2Tr, 130,168; D3Tr. 52, 69).

[ ] was a student in the [ ] school system from the first grade through middle school For the 2003-2004 school year he attended [ ] , pursuant to an agreement between the parents and (Hearing Office Ex. 1; Ex. PS 30-35, 37)

Dr. [ ] is [ ]'s father. He has been actively engaged in [ ]'s special education participation since [ ] first became eligible, when he first started school, [ ] was assaulted and teased at [ ], and Dr. thought that was not a safe environment for him, He heard about [ ] from a friend, and placed [ ] there for the summer session in 2002. [ ] did not qualify for ESY services during that period of time because he didn't regress enough during the summer months (D3Tr. 5, 7, 8-10).

Dr.[ ] has participated in all of [ ]'s IEP meetings. After the private day placement was recommended in 2004 there was no discussion regarding any particular program. Furthermore, there were no conversations with [ ] personnel regarding any specific private day program at any time. He is simply looking for the program which best meats the needs of his son. If a private day program could be found which would meet this criterion, he would have no objection to [ ]'s participation in such a program (D3Tr. 5, 146-148 152, 154,155,156).

In April, 2004 [ ] made a deposit with [ ] for the 2004-2005 academic year. In May, 2004 he made a deposit for the 2004 summer program. Had he not made the

deposits, [ ]'s potential place In these programs might have been allotted to another (Ex. 68 & 69;Tr. 10,161)

[ ] is [ ]'s mother. She has been extensively involved [ ]'s special education participation since its inception. She has observed him in class, communicated frequently with his teachers, and attended all of the IEP meetings. She thought that the special education program for [ ] elementary for was good, but was less than enthralled by the [ ] program. In order to assist, she contacted the Virginia Autism Research Center (VARC) and induced them to put on a seminar at which [ ]'s special education team attended, In addition, VARC provided training for [ ]'s Individual aide (D1Tr. 36; D3Tr. 165-167, 171).

She frequently communicates with both [ ] and his [ ] counselors and teachers, and thinks that the staff deals very well with [ ]. (D3Tr. 172, 180).

Ms.[ ] visited [ ] School in 2003 when she was considering a private placement for [ ]. However she was not impressed, and concluded that it was not an appropriate program for her son. She also visited [ ] School, and did not think that its program was appropriate for [ ] either. She informed the IEP team members of this position during the June, 2004 IEP meeting (D3Tr. 176, 177-179, 220, 238-237, 248).

Ms [ ] testified that she was unable to agree with the private day placement of the IEP because she had insufficient knowledge regarding the specifics of the program. She also indicated that supplemental services would be necessary to meet the IEP goals and objectives, and these services should be specified in [ ]'s

IEP. This is especially true since [ ] has a difficult time adjusting to transitions in his life (D3Tr. 217, 218-219).

Subsequent to the IEP meeting and report, which the parents refused to sign except insofar as it related to the summer ESY program, as they did not agree with the placement conclusion [ ] sent out application packets to five private day schools in the Washington metropolitan area. [ ] School, and [ ] reviewed the packet and concluded that they did not offer the type of services [ ] needed, or that they had no openings. [ ] requested an interview with Ms.[ ], which she attended in early July.

She spent approximately one and one-half hours, and spoke with Ms.[ ]. ESY was not discussed. She also observed a class in the gym. She concluded that [ ] was simply not a good fit for [ ]. She also visited [ ] but concluded that ft had no social programs beyond the normal school day, which did not seem to fit [ ]'s needs (Ex. 18; D3Tr. 196, 200-203, 204, 205, 208f 209-210, 212, 214, 234, 249).

[ ], Ph.D. has been a neuropsychologist since 1984, He received his undergraduate and master's degree from the University of Washington, and his Ph.D. from the University of Minnesota. He has been on the staff at Harvard University and Tufts University Hospitals, and is currently on the staff at Children's Hospital and George Washington University Hospital The majority of his patients are special education students. He presently evaluates children for special education programs, and is familiar with the IEP process. (D3Tr., 22, 23-24, 25).

Dr. [ ] has known [ ] since he was approximately five or six years old. [ ]'s parents became concerned about his academic and social progress, so Dr. performed a psychological evaluation of [ ] September and October, 2002. This evaluation consisted of the administration of some twenty-five tests and subtests {Ex. 4; D3Tr. 26, 27, 28),

The evaluate, Dr.[ ], Ph.D concluded that [ ] was friendly and enthusiastic and worked well within the structure of the one-on-one testing. However, he did demonstrate difficulty in sustaining his attention, and was distractible. He also displayed significant language problems (Ex. 4).

On the Wechsler intelligence Scales for Children-Third Edition (WISC-III) test demonstrated a verbal IQ of 84, a performance IQ of 88, and a full scale IQ of 73, These scores indicate [ ]'s relatively strong performance in verbal conceptualization, and relatively weak performance in spatial and visual performing, Dr, concluded that [ ]'s ability to learn and to retain verbal material was appropriate for his age, but his ability to think flexibly and retain Information m working memory was less well developed. On the performance scale. Dr. concluded that [ ]'s abilities were impaired, which was consistent with his previous diagnosis of having a non-verbal learning disability (Ex. 4).

In the area of verbal information processing, [ ]'s word knowledge was average, but his verbal comprehension and verbal expression/production were below average. In the areas of verbal learning and memory, phonological awareness, and verbal concept formation and abstract reasoning [ ]'s performance was uneven or

inconsistent (Ex. 4). The visual-spatial organization and visual-motor integration tests Indicated that was performing at a below average scale. The attention and executive functioning tests demonstrated that [ ] had difficulties in these areas. Dr. [ ] concluded that the problems in the attention ares indicated that had a continuing attention disorder (ADHD), which his medication was not containing, and that the problenns in the executive functioning area Indicated that had difficulty in generating and implementing strategies to organize and retrieve information (Ex. 4).

In the academic achievement areas, the test scores revealed that although [ ]'s reading skis were average, his reading comprehension skills were below average. Similarly, although his spelling skills were average, his ability to compose logical and grammatically appropriate sentences was below average, His math skills were uniformly below average, which is consistent with the diagnosis that [ ] has a specific learning disability in the math area (Ex 4).

In the area of social/emotional functioning, Dr [ ] concluded that [ ] is an immature and vulnerable youngster, quite dependent on adults for guidance and structure In his life (Ex. 4).

The psychological evaluation concluded that [ ] needed an environment which would provide him with intensive, multi-sensory Instruction in all academic areas, and enable him to improve his self-esteem and social abilities. His academic requirements would include a small class size and some individual tutoring. His social skills requirements would include intensive

one-on-one instruction and supportive group activities (Ex. 4).

Dr. [ ] testified that [ ]'s primary deficits were his multiple deficits, including nonverbal learning disabilities, memory problems, attention and executive functioning problems, and social problems. [ ]'s weaknesses are extremely weak. He needs to feel safe, otherwise he experiences severe attention problems. He also needs a low student/teather ratio to learn. His social/emotional environment is enormously important to [ ], as he cannot function under stress. [ ] has difficulties in understanding others, in verbally defending himself, and in properly interpreting social clues (D3Tr. 31-33, 34, 35, 37, 38, 43-44, 45, 69).

Dr.[ ] saw [ ] in June, 2004, and is of the opinion that there are many benefits to [ ]'s attendance at [ ]. His social and emotional development was very good at [ ], as he developed friends. Frequently private day students do not develop friends outside of school. [ ] became more relaxed and self confident, and learned to self regulate.

[ ] is also important because most of the students there are at the same level, with the same disabilities. The twenty-four hours per day, seven days per week intervention facet is extremely important for [ ]. The [ ] program is designed specifically for the low functioning limited disability student, such as [ ]. (D3Tr. 29, 47-49, 50, 82).

Dr.[ ] is concerned that if [ ] is placed with students having significant behavioral problems this will have a negative impact on him. [ ] is basically a well behaved

student and does not need a behavioral based program (D3Tr. 54-55, 56).

Dr.[ ] stated that [ ] could benefit from private day placement, but that the program would have to be specifically geared to low functioning limited disability students, plus provide social skills services and supplemental services, such as speech and language therapy, etc. However, he did not know of any private day school in the Washington metropolitan area which provided this panoply of services, but has not had any recent contact with [ ] or [ ]. He though that transitions were also important to [ ], as they tend to make him anxious and stressed. He believed that transition planning should be part of the IEP (D3Tr. 58, 59-61, 62, 70, 71-72, 76, 77).

[ ] is a licensed clinical social worker and child psychologist who has been engaged In practice for the past twenty years. She has been working In the area of child autism spectrum disorders for the past thirteen years, and sees approximately fifty children per year. She works with children and thefr families, special education programs, and participates In IEP meetings (D2Tr. 102-103).

Ms.[ ] has known [ ] for the past six years. She evaluated him for his social skills group, and continued to counsel him approximately twice weekly until he went to She continues to see him when he is home for breaks, etc. She worked with the staff at [ ] elementary school when [ ] was a student there, and helped to establish a social skills program for him there. She reviews his IEPs yearly, and makes suggestions

regarding them to his parents and school officials (D2Tr, 109-110, 112, 113).

When [ ] attended [ ] it was a particularly stressful time for him. He had high anxiety, and was scared and confused, He felt over controlled by the aide who had been assigned to him. He was teased and bothered by disruptive students. She had meetings with administrators and found them to be receptive to her suggestions. She communicated with [ ], outlining the problems and suggesting solutions (Ex. 5; D2Tr. 115-117, 173-174, 177, 211-212, 214-215).

Ms, reviewed Dr [ ]'s evaluation of [ ] , which she agreed with, has nonverbal learning disabilities, and POO. He has extreme executive function deficit which are the components which permit a person to process Information, make plans, etc. is self absorbed, and has problems engaging in dialogues with his peers. He is good at following specific, logfcaf Instructions and directions. He can communicate well, but not function at the same level of communication (D2Tr. 167-171, 172).

She has noticed a change for the better in [ ] since he has been attending [ ]. He looks different has a broader range of topics to discuss, fs more willing to listen to another person's point of view, and feels important (D2Tr. 183-184, 222).

Ms. is familiar with the [ ] and [ ] private day programs. She feels that the former is not appropriate for [ ] as its programs are based upon behavioral management which is designed to make a change in a student's behavior. [ ]'s not a behavior problem, thus these

strategies will not meet his needs. This witness claims that the [ ] students are violent and disruptive in the classroom. If [ ] were thrown in with this type of student lie would regress into a confused state. Although Ms. [ ] has never visited [ ] she has been involved in IEP meetings involving this school (D2Tr. 188, 189, 190-191, 197, 198, 203, 205, 208, 207).

With respect to [ ] , Ms [ ] is of the opinion that that program is designed primarily for students with psychiatric problems, who are disruptive In the classroom, would be unable to develop any long term relationships at [ ] because of the constant student turnover. Thus the program would not be appropriate for [ ] either. She has admittedly, never spoken to [ ] personnel about their program (D2Tr. 198-199, 208, 209).

Ms. thinks that [ ] might benefit from a private day program, if it was geared towards his needs. However, she knows of no such program in the Washington metropolitan area. She also thinks that any transition support offers should be contained in [ ]'s IEP (D2Tr. 200, 201-202, 203).

[ ] is the Educational Supervisor of Student Services & [ ] School.

She works with the students, teachers, and dormitory coordinators. She is a licensed special education teacher (D2Tr, 120).

[ ] located in [ ] Massachusetts, was founded in 1957, It is a residential school with a potential enrollment of 183 male and female students in its secondary and post-

secondary programs. During the 2003-2004 school year 115 students were in attendance. On measures of intellectual ability, the majority of the students score within the 70-100 range, and have a primary diagnosis of learning disability and/or complex language or learning disorder. [ ] is licensed by the Commonwealth of Massachusetts and fully accredited (Ex. 18; D2Tr. 138).

[ ] provides academic instruction by means of a thematic, integrated curriculum. Its maximum class size is eight students, and its faculty/student ratio Is 1:4, in addition to academic instruction, [ ] provides an advisor to each student. The task of the advisor is to act as a liaison between home and school, and provide support to the student in areas such as self-advocacy, self-awareness, and social skills. Students at [ ] also have the opportunity to participate in various social, recreational, and sporting activities. Students have individual advisors, who provide individual informal counseling {Ex. IS; D2Tr. 148).

Ms. [ ] first met [ ] when he enrolled at [ ]. She remembers him as i nitially being reluctant to interface with the other students and the teachers at [ ]. He was rather timid, and needed interventions from both his academic and residential support teams. He needed reinforcement on a daily basis. [ ] was unable to problem solve on his own when he arrived at [ ]. His non-verbal and Asperberger problems needed to be worked on (D2Tr. 120, 122, 130, 131).

[ ]'s [ ] schedule provides that he attends classes from 8:15-3:00 Monday- Friday. It also provides him with one hour of reading per day. He still requires assistance

with his reading comprehension skills. He also receives speech/language assistance. continues to have problems with math (D2Tr, 123, 128, 143).

At [ ] the residential and academic support teams work on the same skills for the students on a daily basis, The two teams meet each afternoon, so that the residential team is aware of what the classroom team has been working on in the classroom during the day. Then when the student returns to the dormitory in the evening the residential team can continue the work which was Initiated \n the classroom. In the morning the residential team leaves notes for the classroom team If any event transpired In the evening which needs to be worked on during the day. In addition, [ ] can get informal counseling at any time (D2Tr. 128-129)

Ms [ ] has noticed major improvements in [ ]'s social and academic skills during the past year. He is now able to think things through, initiate conversations, and is developing new friendships. The majority of these changes occurred during the second semester, The Increased social skills exhibited by [ ] have enabled him to increase his ability to learn, take risks, etc. (Ex. 25; D2Tr, 131, 132).

[ ] resides in a dormitory along with ten-twelve other students. He has been involved In several altercations with other students at [ ], in both the classroom and the dormitory. Ms [ ] describes these problems as "typical teenager stuff" (Ex 64; Ex. 20, 21; D2Tr. 143, 154, 156-157, 159).

Ms [ ] opines that [ ] needs assistance from his support teams on a daily basis, and needs to practice and hone

the skills he learns in the classroom after school hours. He needs to be able to communicate with his friends after school. For these reasons she is of the opinion that private day placement is not a viable option for [ ]; if [ ]'s present level of support is withdrawn, he would regress, and become depressed. A move from to private day placement would be a major transition for [ ], one which he would not be able to adjust to without consistent and frequent support {D2Tr, 134-137, 183, 184).

Ms. [ ] has had conversations with [ ]'s teachers and counselors and with individuals from [ ]. She also participated in the 2003-2004 IEP meetings (D2Tr, 121-122, 160).

[ ] is the Private Placement Specialist for [ ], a position she has held for the past three years. She received her BS in education from the University of Virginia, and her Masters degree in learning disabilities from the University of Connecticut In 1977. She has been with [ ] since 1980, being employed as an educational diagnostician, learning disability resource teacher, and elementary school learning disability liaison teacher. Her present position involves the placement of students in private day or residential schools. In this regard she visits the schools, studies their programs, consults with the parents and teachers, and is involved m the planning and implementation of transitional strategies for return ing to public schools. She has visited the facilities of [ ] School and [ ] School. Although she has communicated with the personnel at the [ ] School, she has never visrted that facility {DlTr. 125-130, 136, 209}

Ms [ ] considers that [ ] School, located in [ ], Virginia meets the individualized educational needs of [ ], both academically and vocationally. It offers a very structured program, has a good record in the areas of academics and behavior, offers community involvement programs, and uses the level system of progression. She thought that [ ] would not be placed with aggressive students if he attended [ ]. [ ] School, located in [ ], Virginia, offers a similar program, but works on the team concept of teaching and learning. This witness opined that either or could successfully implement [ ]'s 2004-2005 IEP. (DITr. 159, 180, 166-171, 236-236, 242).

She was concerned about the dormitory situation at [ ], and about the problems which [ ] has encountered In dormitory life (Ex. 64). She stated that the dormitory incidents were not known by the IEP team when it was meeting and preparing the IEP. She also thought that dormitory life was not necessary for [ ] to receive educational benefit (D1Tr. 173, 174, 191, 197, 198-200, 241),

The question of individual counseling also arose during the course of this witness' testimony. Ms [ ] testified that [ ] School would assign a counselor to [ ] who would work with him for the IEP mandated one hour per week. In addition there was individual counseling on calf whenever needed, and group counseling in the classroom.

[ ] also provided [ ] with one hour per week of Individualized counseling, and crisis Intervention counseling twenty-four hours per day, seven days per week was also available (D1Tr. 224-227, 230).

Ms. [ ] was a member of [ ]'s 2004-2005 IEP team and participated in all of the meetings. Other participants Included [ ]'s parents, other [ ] teachers and administrators, and [ ] School personnel. She provided [ ] with a draft copy of the IEP so that the IEP team members would have the benefit of [ ]'s comments and suggestions which were subsequently incorporated into the IEP. She read the psychological evaluation report prepared by Dr.[ ]'s office, but not until after the IEP meetings had been completed. She is of the opinion that the private day placement recommended by the IEP team would provide educational benefit to [ ] while at the same time constitute the least restrictive environment for him. Although [ ] was not present for placement discussions at the last IEP meeting, it was obvious to this witness that they wanted [ ] back at [ ]. If she thought that [ ] needed residential placement, she would have had no hesitation to agree to it. (Exs, 8-12; D1Tr. 133, 141-142, 145-152, 156-157, 177, 211, 246; D2Tr. 259-262).

Subsequent to the development of the IEP, the parents agreed to the ESY provisions only. Ms.[ ] then put together an application "packet" regarding [ ] and sent it to various private schools in the greater Washington Metropolitan area. Of the five schools contacted, only two, and, responded affirmatively, and indicated a willingness to interview's parents (Exs. 16 & 17; DITr. 154,164). As will be subsequently discussed, it is rather unclear on the record whether this affirmative response Included the ESY proposal or not.

[ ] was present on July 2, 2004 when Ms.[ ] signed the IEP, and subsequently mailed the IEP packets to the five private day schools mentioned previously. She

mailed the packets the next day, and phoned the schools and asked them to review the packets as soon as possible in view of the time constraints (D3Tr, 222, 223, 225).

[ ] was a psychologist employed by [ ] since 1994. She obtained her MA In clinical Psychology from the University of Maryland in 1994. She is certified as a school psychologist. Her position primarily involved trying to understand student functioning and to assist them in achieving their educational goals, She also does psychological evaluations of students, counsels students and parents, and assists in crisis Interventions (Ex.72); D2Tr. 4, 5-6).

Ms.[ ] met [ ] when he attended [ ] Middle School. She gave him psychological testing in 2002 and 2004. Both tests resulted in the same basic findings and recommendations about [ ]. She found [ ] to be a hard worker, although In need of reassurance. He exhibited no particular attention deficit, except when the material at hand became difficult for him to comprehend. Her conclusions were that fn the cognitive skills assessment [ ]'s performance was below average. When tested on the Gray Oral Reading Test (GORT-4) in 2002 his standard scores were significantly lower than his "off limits" scores. The difference between the two methods of testing, i.e., standard and off limits, is that the former Is timed; whereas the latter, which is given Immediately after the testing has concluded, is not The witness was of the opinion that the off limits scores more accurately reflected [ ]'s abilities. In 2004 the standard and off limits test scores were practically identical. Ms. [ ] found [ ]'s decoding skills to be good, but his rate of reading to be slow and his

comprehension level not very good. [ ]also demonstrated oral language problems and math and writing problems. She concluded that [ ]'s verbal cognitive ability fell below the average range, so that he has problems understanding language and expressing his ideas. She considers that [ ] has autistic symptoms, and needs to work on his skills at school and at home to develop them. Several recommendations were made for both [ ] and these recommendations, for the most part, were contained in both the 2002 and 2004 reports. Ms. [ ] recommended that, among other items [ ] would benefit from a very structured clay, constant reassurance, having someone monitor his level of attention, learning basic math skills, feedback from his teachers, short summaries to preface reading assignments, class notes prior to the lesson, extended time to take tests, and taking tests orally where possible (Exs. 38 & 39; D2Tr. 7, 11-13, 16, 20, 21, 27, 28-30, 63-70, 73-76, 79-82, 84, 88).

Ms. [ ] was also a member of [ ]'s 2004-2005 IEP team. She participated in all of the meetings and agreed with the conclusions of the member of the team regarding [ ]'s placement She was concerned because [ ]'s academic progress had not improved to the extent she expected. She reviewed the psychological evaluation of [ ], Ph.d. prior to the IEP meetings and found nothing in that report which would lead her to believe that private day placement would not be beneficial for [ ]. She thought that private day placement would provide social skills assistance and supplemental services.

Ms. [ ] did not think that [ ]'s transfer to a private day school would represent a particular transitional problem. She opined that private day placement would

provide material educational benefit in the least restrictive environment and could perceive no educational benefit in the residential program, as it would be too restrictive. She admitted that although private day placement was the recommendation of the [ ] members of the IEP team, no specific private day school programs were discussed. She also concluded that there were no significant differences between her findings and conclusions in her evaluations and those of [ ]. Although different tests were used, [ ]'s patterns of strengths and weaknesses were the same. There were no differences between [ ]'s academic strengths and weaknesses on the evaluations (D2Tr. 9, 15, 27, 32-38, 39, 40, 42, 43-44,48, 52, 54, 56, 60).

[ ] has been employed as an Autism Resource Specialist by [ ] since 2000. She received her undergraduate degree from the University of Rhode Island in 1997 and her graduate degree from Simmons College in 2000, She received her license from the Commonwealth of Virginia in 2000 (Ex. 72D; D1Tr, 20, 21, 117).

Ms. [ ] testified that she works with teachers, parents and support groups, oversees programs dealing with autistic and development delays in students, and attends IEP meetings. She has worked with students having attention problems, including a stint at the New England Center for Children, which specializes In children with autism and behavior disorders in both an academic and residential setting (Ex, 72D; D1Tr. 22, 23, 24).

Ms.[ ] first encountered [ ] in 2002 when he was a seventh grader at [ ] Middle School. At that time he had been diagnosed as having a social cognitive deficit and

pervasive development delay (PDD) and multiple learning disabilities. Social cognitive deficits would Include such items as missing social clues, etc and would be indicative of not functioning easily in a social setting. PDD is different from autism, and is not a special education disability by itself. In 2002 she worked with [ ]'s IEP team, spoke with his parents, and observed him in the classroom. Although she was familiar with [ ]'s individual therapist, [ ] she has never spoken to her (D1Tr, 28, 27, 28, 70-72).

Ms.[ ] also developed several plans for [ ] at [ ]. One was a behavior contingency plan, which was designed to deal with his attention deficit problems. She later developed a behavior intervention plan, social interaction plans, and strategies for dealing with some of [ ]'s problems. (Exs. 43, 53, & 54: D1Tr. 32, 34, 35, 36, 72, 73).

She also worked with the 2003 and 2004 IEP teams of [ ] , and observed him at [ ]. Through her [ ] observations and conversations with his teachers she concluded that had attention problems. His math was at a first grade level, and his social studies level was not op to his [ ] standards. Ms.[ ] observed [ ] reading at [ ] but thought that he could not understand what he was reading, as the comprehension level was too high for him. She thought that his work at [ ] was at an early elementary school level, and was not challenging enough for him. She observed that his interaction with his [ ] peers was good, and considered it consistent with his [ ] peer relationships (Ex. 66; D1Tr. 29, 40-43, 44-45).

The witness did not observe the residential component of the [ ] services being provided [ ], as it was deemed

not necessary for her to so do. However, she did observe [ ] at times other than in the classroom at [ ], such as in the cafeteria, in the transition times between classes, etc. She also reviews the progress reports prepared by [ ], including those regarding [ ]'s social cognitive deficits (D1Tr. 77, 78, 79, 80, 81).

In the reading class at [ ] in which Ms.[ ] observed [ ], there was a 4:1 student teacher ratio. The particular day Ms. [ ] observed the latter was experiencing difficulties in comprehending the story. The [ ] teacher sat next to [ ] throughout the class and repeatedly prompted him to keep him on course (DlTr. 82, 64, 88-90, 93).

Ms.[ ] was a member of [ ]'s 2004 IEP team. As such, she participated in three meetings; May 21 and 29, and June 9, 2004-regarding the preparation of [ ]'s IEP. Each meeting lasted approximately three hours. Other participants in the meetings included [ ]'s parents, other teachers and administrators, and personnel from [ ] School. From these meeting the 2004-2005 IEP for [ ] was developed. The witness agreed with the other member of the team that private day placement was appropriate for [ ] even though no specific private day placement program was discussed or promoted. She was, however, familiar with the [ ], [ ] and [ ] programs although she had never visited [ ] or [ ]. (D1Tr. 46-49, 100, 101, 102, 103, 120-121).

Ms. [ ] has worked with students transitioning into and out of private placement, and considers herself to be experienced in this matter. She testified that the issue of transitioning was discussed at the IEP meetings* and that the IEP team developed strategies to deal

with [ ]'s transition into private day placement, although not specifically labeled as "transition services" in the IEP. On the other hand, she did not notice any specific reference to "transition services*" in the educational plan which [ ] developed for [ ] either. (DlTr. 45-48, 50, 51-52, 53, 109, 113-114, 122-123).

This witness reviewed the Psychological Evaluation of [ ] prepared by Dr. [ ] in 2002, and the Psychological Evaluation Reports of [ ] prepared by Ms.[ ] of [ ] in 2002 and 2004 and found them to be consistent in their recommendations for [ ] and consistent with private day placement (DlTr. 54-55).

[ ] is the Program Supervisor for [ ] School. She taught at [ ] for ten years, and has been in her present position for the past three years. [ ] has been in existence since 1987. It provides individualized educational programs implemented by classroom staff. The teacher/pupil ratio is 1:4.5. It also provides small group Instruction, one-on-one intervention, speech and language development social skills training, and daily living skills. All teachers are certified by the Commonwealth of Virginia. [ ] employs numerous other professionals, including therapists, counselors, and psychologists (Ex. 70; D3Tr. 89, 98, 99, 107, 139-140).

The majority of students at [ ] are in the 14-18 year old range, with a wide range of disabilities, including multiple disabilities. Most of the students have social skills problems and learning difficulties. In assigning students to particular classrooms, social functioning is of the highest Importance. This enables students with the same types of needs to be kept together. [ ] provides a highly structured program, and tries to keep

distractions to a minimum. The students are with staff and classmates throughout the day, and there is a counselor for each classroom. Individual counseling is also available. Although there is nothing specific written into the program, [ ] routinely provides transitional services, working with incoming and outgoing students and their parents and the other facilities involved. [ ] has students with disabilities similar to [ ]'s in attendance, and has successfully dealt with these students and their problems in the past. [ ] uses the level system of progression, which is primarily based upon the student's behavior. However, academic factors play a large role in the program as well (D3Tr, 92, 93-94, 95, 96-97, 103, 105-108, 111, 112, 118, 121, 124).

Ms. [ ] had an intake interview with [ ]'s mother in July 2004, but no specific decisions were made as [ ] also had to be interviewed as well (D3Tr. 91, 92, 128).

Discussion and Conclusions

8 VAC 20-8 76 J17 provides that each hearing officer decision shall include a determination of whether (a) the notice requirements to the parents has been satisfied, (b) the child has a disability, (c) the child needs special education and related services, and (d) the local educational agency is providing a free appropriate public education.

In this proceeding the parties agree that (a), (b), and (c) have been met so no further discussion of these items shall appear in this decision, However, (d) appears to be the central issue involved herein.

The starting paint for our discussion Is the Individuals with Disabilities Education Act, (IDEA) 20 ILS.C 1400 et seq, The objectives of that Act are to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and Independent living." 20 U.S.C. 1400(d)(1)A.

A *free appropriate public education" is defined by the Act as "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) Include an appropriate preschool, elementary, or secondary school education in the State involved; and, (D) are provided in conformity with the individualized education program required under section 614(d). 20 U.S.C. 1401(8).

There are three primary issues for discussion and decision in this proceeding: (1) Who has the burden of proof; (2) Was the IEP proposed for [ ] valid; and, (3) Would private day placement meet the FkPE requirements insofar as [ ] is concerned Each of these issues shall be considered seriatim.

Burden of Proof -- As [ ] has raised questions concerning the appropriateness of the IEP and whether his proposed private day placement meets the FAPE requirements, it is his burden to establish that the IEP is not appropriate and that he would not receive FAPE if placed in a private day program. *Weast v. Schaffer.* 337 F.3rd 449 (CA 4, 2004); *Spielberg v. Henrico* County

Public Schools, 853 F.2d 256, 258, 25S (CA 4, 1988); *Bales v. Clark*, 523 F. Supp 1366, 1370 (E.D.Va, 1981).

Validity of the IEP-In order to determine whether the IEP proposed for [ ] was valid, it must be noted that there were three IEP meetings, on May 21 and 29, and June 9, 2004. Attendees at these meeting Included [ ]'s parents, [ ] personnel, and, by telephone, [ ] personnel Each meeting lasted for approximately three hours. [ ]'s progress, the eighth grade Standard Of Living (SOL) test, his dormitory life at [ ], the type of diploma [ ] was to aim for, his transition back into the community, his social and academic progress at [ ], and his placement for the 2004-2005 school year were discussed. Notably, [ ] personnel did not participate in the placement discussion, which was the last Item to be covered, as prior commitments had to be attended to. The result of these meetings was an IEP of approximately thirty pages In length. It contains a fairly lengthy description of [ ]'s present level of performance, goals and objectives for approximately nine different academic and social areas for him, a SOL assessment and a transition plan. Apparently the parties were in substantial agreement with the content of the IEP except for one major area-placement Subsequent to the preparation and distribution of the IEP and the last meeting of the IEP team, [ ] provided the parents with an explanation of Its refusal to change its position on the private placement issue (Ex. 14, 29; DlTr. 46-49, 141-142,145-152; D2Tr. 32-38, 122; D3Tr, 146-148, 152, 184-187).

The parents contend that the IEP does not provide for FAPE for three primary reasons. First, the adequacy of services as described in the IEP is deficient. [ ] needs

more than one hour of private counseling per week, The transition services to be provided for if he transfers from residential placement to private day placement are not adequately set forth. There are deficiencies in the description of supplemental services to be provided. [ ] needs services in both academic and non-academic areas, but they are not provided for in the IEP (Tr, D3Tr. 275W 278).

Second, the ESY services mentioned in the IEP were never provided (D3Tr. 282) Third, In the comparison of residential and private day placement, only the former will provide [ ] with a meaningful educational benefit In the least restrictive environment The precise schools and benefits of private day placement are not set forth in the IEP. An investigation into the existing private day schools in the Washington metropolitan area will disclose that the FAPE components necessary for [ ] are simply not available at any existing facility, thus [ ] is the only alternative (D3Tr, 285-288, 289, 291, 315, 319).

[ ] argues that the IEP does provide for FAPE, The IEP was a joint cooperative effort of all of the Involved parties, it contains a detailed description of [ ]'s present level of performance and goals and objectives. The question is not whether the residential program Is superior to the private placement program, but whether the private placement program provides for FAPE for [ ] (D3Tr. 295, 308).

Both the federal regulations (34 CFR 300, 347) and the Virginia regulations (8 VAC 20-80-82 F) set forth the requirements for the contents of an IEP. The IEP

prepared for by his IEP team for the 2004-2005 school year adequately fulfills these requirements.

IDEA does not require that the school system provide the child with the best education possible. The system must provide "personalized instruction with sufficient support services to enable the handicapped child to benefit educationally from that instruction". *Hessler v. State Board of Education*, 700 F.2d 134, 139, C. A. 4. 1983). It must also be remembered that FAPE only guarantees an "appropriate" free, public education, not necessarily the best public education that the school system can purchase. *Lewis v. School Board*, 808 F, Supp 523 (E.D. Va., 1992).

It is argued that the proposed IEP involving private placement does not take into account the special and unique needs of [ ], i.e. that he cannot learn in a stressful environment and that he requires an academically challenging structured environment. It appears, however, that [ ] was cognizant of [ ]'s academic strengths and weaknesses.

[ ] was a student in the [ ] system for a number of years and a number of IEPs had been prepared for him. He had been given several psychological evaluation tests by [ ] personnel, and the personnel were familiar with Dr. [ ]'s testing results. Indeed, the present level of performance portion of the IEP demonstrates that the [ ] personnel were cognizant of [ ]'s strengths and weaknesses, both academic and social. The IEP further provides for twenty-four specific general curriculum support standards designed to enhance educational experience (Ex. 29).

The parents also argue that the description of the supplemental and transitional services to be provided is not specifically set forth In the IEP, Several witnesses [ ], [ ], and [ ] testified that the provision of these services was a "given" and need not be specifically set forth in the IEP. It was stated that the transition plan actually involved several components, counseling, speech and language, etc., which were proposed in the IEP, thus there is no need to list them repeatedly. Other witnesses [ ], [ ], and [ ] thought that the transition services to be provided ought to be specifically set forth in the IEP. It is my opinion that the potential problems to be encountered by the transition to private day placement, such as stress, different environment, confusion, etc, are to be met with such supplemental services as counseling and therapy, which are set forth in the IEP. Thus it is not necessary for the IEP to presume what transition problems [ ] may encounter, then describe what services will be provided to combat them. This is too Inflexible an approach.

The question of the provision of ESY services for the period July 1-August 1, 2004 has also arisen. By the time the parents had signed the IEP form indicating that they were in agreement wrth this portion of the IEP, it was July 2. Thus [ ] couldn't have known of the acceptance of the offer until after the program was to have commenced. The application packet which [ ] subsequently sent to the private schools contained the IEP, but the cover letter did not address the summer school issue one way or the other. At least one private school, [ ] thought the ESY Issue was moot as, after apparently conversing with [ ]'s mother, it was under the impression that he had already been signed up by the parents to attend a summer program elsewhere

(Ex. 17). I conclude that the lack of provision of ESY by [ ] was simply the result of a miscommunication between the parties, and does not entitle the parents to reimbursement of [ ]'s summer school expenses at [ ] in 2004.

Does Private Placement meet FAPE Requirements -- The question of residential placement, as opposed to private day placement has been before the courts in a number of instances. The deciding factor seems to be that if the educational benefits which can be provided only through residential care are essential for the child to make any educational progress at all, then residential care is required. On the other hand, residential placement is not required where Its attributes merely enhance an otherwise sufficient day program. *Burke County Bd. of Education v. Denton*, 895 F.2d 973, 980 (C.A. 4,1990). The private day placement envisioned by [ ] for [ ] was in a small, structured setting which would provide academic and related supplemental services such as counseling and therapy, This placement would assist [ ] in his transition into the local community, and constitute the least restrictive environment for him. The fact that [ ] did not specify a particular private day program suggests to me that [ ] wanted to give the parents as much flexibility as possible on this issue. Several private day possibilities were suggested, and the parents given the option of choosing the one which was most attractive to them. The fact that they found none of the possibilities attractive does not mean that the approach was not in accordance with the FAPE mandates. Thus I conclude that private day placement does provide FAPE.

Therefore, I find In favor of [ ] on all of the issues involved in this proceeding, and deny the request for relief of [ ].

Appeal Information

This decision Is final and binding upon the parties. Any party may appeal this decision within one year of the date of the decision m either a state circuit court or a federal district court. See 8 VAC 20-80-76(0).

35 IDELR 158
101 LRP 531
00-1898

U.S. District Court, Eastern District of Virginia

Kendall JENNINGS and Bruce and Lauren JENNINGS, Plaintiffs

v.

FAIRFAX COUNTY SCHOOL BOARD, Defendant.
August 14, 2001

Judge

Gerald Bruce Lee, U.S. District Judge

Case Summary

The court found that the district's 1997 proposed placement at a private day school met the student's needs for a LRE that would prepare her for college. In addition to extensive individual attention, the school's curriculum included advanced level math, science and foreign language courses. Two years later, another proposed district placement offered the student advanced level college preparatory classes, the opportunity for a smooth transition from a residential setting to a larger college setting, and an appropriate special education program designed for students with ED. The parents' unequivocal rejection of both offers for a FAPE placement resulted in the court's denial of their private school tuition reimbursement request. The parents unsuccessfully claimed the district committed

procedural violations of the IDEA. The court ruled the parents had effective input into the IEP process and that the district's decision to postpone a formal placement offer did not cause a loss of educational opportunity. The district also abided by the procedural safeguards of having appropriate personnel present at its IEP meeting.

Full Text

Memorandum Order

THIS MATTER is before the Court on Plaintiffs' and Defendant's cross motions for summary judgment. This case involves a family's attempt to seek reimbursement under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400et. seq., from a public school system for the costs of their child's private school tuition. The issue before the Court is whether the defendant school system offered the plaintiff child a free appropriate public education that was reasonably designed to provide the child with an educational educational benefit. Upon review of the submissions and arguments of the parties, this Court holds that the defendant school system did not offer the plaintiff child a free appropriate public education. Plaintiffs refused the offer, and instead elected to place the child in a private school. Therefore, Plaintiffs are not entitled to reimbursement for the costs of the plaintiff child's private school tuition. Accordingly, Summary Judgment is GRANTED in favor of the defendant school system.

I. Background

Plaintiff Ms. Kendall Jennings was a high school

student attending Fairfax County Public Schools. Kendall was identified as a child with special needs. She was diagnosed as having depression, obsessive-compulsive disorder, bi-polarism, and attention deficit disorder. Nonetheless, Kendall took medication for these conditions and was able to function properly and maintain good grades in school. In 1997, when Kendall was a sophomore at Fairfax High School, she stopped taking her medication, and began to have extensive behavioral problems. Kendall's parents, Bruce and Lauren Jennings ("the Jennings"), had Kendall evaluated for special education services under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et. seq. (2000) ("IDEA") Kendall was found eligible for special education services under IDEA as a student with an emotional disability.

On April 6, 1997, Kendall had an emotional breakdown. The Jennings admitted Kendall to the Graydon Manor Psychiatric Hospital. Graydon Manor offered educational classes for Kendall, and Kendall was able to finish the remainder of her sophomore year there. Kendall stayed at Graydon Manor for five months at a cost to the Jennings of approximately $50,000.

The Jennings sought reimbursement under the IDEA from Fairfax County Public Schools ("FCPS") for their cost to send Kendall to Graydon Manor. IDEA requires FCPS to ensure that all disabled children have the right to a free appropriate public education ("FAPE") because Virginia, and in turn the FCPS system, receives federal funding under IDEA. See20 U.S.C. §§ 141-12(a) (stating state eligibility requirements for IDEA funds), 1401(8) (defining FAPE). Under IDEA, FCPS reimbursed the Jennings with $8,440 for

Kendall's schooling at Graydon Manor in an attempt to reflect the cost of the appropriate education services Kendall received at that facility.

In accordance with IDEA's requirements, on April 27, 1997, the Jennings and representatives of the Fairfax County Public Schools ("FCPS") held an Individual Education Program ("IEP") meeting to discuss appropriate education services for Kendall. See20 U.S.C. § 1414 (d) (explaining IEP requirements under IDEA) The IEP team discussed sending Kendall to a special education program for emotionally disabled students which would be located at a large high school. (A.R. at 164: Reviewing Officer Decision at ¶ 9.) During the IEP meeting, the Jennings requested that the IEP team reconvene at a time when a contract specialist could be present.

On June 12, 1997, the IEP team reconvened with a contract specialist present, Ms. Deidre Lavery. No placement decision was reached, and the Jennings made no request from FCPS for funding for educational services at this meeting. Instead, the IEP team "decided to wait [un]til Kendall was either discharged or withdrawn from Graydon Manor before a placement decision could be made." (A.R. at 54: December 1997 IEP at 3.) The IEP team agreed that Kendall's needs were not educational in nature, and recommended that the Jennings pursue funding through the Comprehensive Services Act ("CSA"). On June 23, a plan was approved under the CSA for Kendall to continue at Graydon Manor; however, funding was unavailable at that time.

In September 1997, the Jennings enrolled Kendall in

the Hyde School in Bath, Maine based on the recommendation of a Graydon Manor psychiatrist. The Jennings did not inform FCPS that it was removing Kendall from Graydon Manor and placing her in the Hyde School. The Hyde School is a reputable private boarding school where many students who have behavior problems attend. However, the Hyde School does not offer a special education program, or have specially trained special education teachers and personnel. The Hyde School tuition is approximately $25,000 per year. In November 1997, the Jennings sent FCPS a reimbursement claim for their payments to the Hyde School. (A.R. at 131: Letter from FCPS Division Superintendent Daniel Domenech to Dep't of Educ. Specialist James R. Cooke, Jr., acknowledging receipt of the Jennings' request for payment.) This claim prompted Kendall's IEP team to reconvene.

On December 18, 1997, the IEP team reconvened to discuss placement options for Kendall. The team discussed Kendall's present level functioning and reached a consensus that Kendall could receive an appropriate education in an area private day school. FCPS recommended to the Jennings a program for students with emotional disabilities as described in the IEP. (A.R. at 54: December 1997 IEP at 1.) The IEP described the program as a private day school placement. (A.R. at 55: Letter from Chantilly Center Principal Sanford Robeck to the Jennings substituting page 3 of Kendall's December 1997 IEP.) The Jennings rejected this recommendation. (A.R. at 54: December 1997 IEP.)

On January 27, 1999, the Jennings requested a due process hearing to seek reimbursement for Kendall's

educational expenses at Graydon Manor for three months, the Hyde School for three years, and for attorney's fees. The Hearing Officer heard five days of testimony in May and June 1999, and found that FCPS offered a free and appropriate education to Kendall at a local private day school program. (A.R. at 119: Hearing Officer Report at 3.) According to the Officer, the best placement for Kendall would be a local private day school program at a local facility staffed with specially trained special education teachers and personnel. The Hearing Officer held that FCPS was not required to fund Kendall's attendance at the Hyde School because FCPS met its burden of showing that it offered a FAPE for Kendall. Nonetheless, the Hearing Officer held that FCPS should reimburse the parents in an amount it would cost FCPS to fund Kendall's educational expenses at a suitable local private day school program. The private day school considered were the Keller School and the Dominion Day School which cost between $30,000-32,000 to attend.

During this hearing, FCPS learned that Kendall had not completed her 12th grade education requirements, and that the Jennings intended to send Kendall to the Hyde School for the 1999-2000 school year. In light of this information, FCPS initiated an IEP meeting for August 27, 1999. During the August 1999 IEP meeting, the school staff recommended a program at the Woodson Center. (A.R. at 126: August 1999 IEP at 1.) The Woodson Center had extensive resources and services for students with emotional disabilities, and prepared students for college. (A.R. at 164: Reviewing Officer's Report at ¶ 16.) The Jennings rejected the recommendation. (A.R. at 126: August 1999 IEP at 1.) Instead, they decided to re-enroll Kendall in the Hyde

School for the 1999-2000 school year.

In September 1999, both the Jennings and FCPS appealed the Hearing Officer's decision to a Reviewing Officer. The Reviewing Officer conducted another due process hearing on October 6, 1999. The Officer received additional exhibits and briefs, and rendered its decision on November 10, 1999. The Reviewing Officer held that the Jennings were not entitled to reimbursement for Kendall's educational expenses at the Hyde School because FCPS provided Kendall a FAPE, which the Jennings rejected. (A.R. at 164: Reviewing Officer's Report.) The Reviewing Officer also held that the Jennings were precluded from recovery because they failed to give FCPS proper notice of their intention to send Kendall to residential school for the 1997-1998 school year, and failed to use the administrative process to seek further IEP review for the 1998-1999 school year. The Reviewing Officer further held that the Jennings did not sustain their burden of proof as to the inadequacy of the proposed IEP program. Moreover, the Reviewing Officer reversed the holding of the Hearing Officer and concluded that FCPS did not have to reimburse the Jennings for the amount that FCPS would have paid for a suitable local private day program because FCPS offered a FAPE to Kendall.

The Jennings filed suit in this Court against the Fairfax County School Board ("FCSB") alleging that FCPS did not provide Kendall with a FAPE, and that they are entitled to reimbursement for the cost of private school tuition fees. Both parties are before the Court on cross motions for summary judgment.

II. Analysis

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that a motion for summary judgment will be granted if it is shown that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See FED.R.CIV.P. 56(c); Celotex Corp. v. Catrett,477 U.S. 317, 322-324 (1986). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. See Anderson v. Liberty Lobby, Inc.,477 U.S. 242, 247 (1986). The moving party is entitled to judgment as a matter of law unless a fair-minded jury could return a verdict for the nonmoving party on the evidence presented. See at 247-48.

A district court reviewing a state administrative decision under IDEA may grant summary Judgment based upon the administrative record. See, e.g., DeLullo v. Jefferson Co. Bd. of Educ., 71 F.Supp.2d 554 (N.D. W.Va. 1998),aff'd,194 F.3d 1304 (4th Cir. 1999). The court should make an independent decision based on a preponderance of the evidence, yet give due weight to the state administrative findings. See School Committee of Town of Burlington v. Department of Educ. of Mass., 471 U.S. 359, 369 (1985); Doyle v. Arlington County Sch. Bd.,953 F.2d 100, 105 (4th Cir. 1992). In particular, the reviewing court should

consider the factual findings in an IDEA agency decision to be prima facie correct. See Kirkpatrick v. Lenoir County Bd. of Educ., 216 F.3d. 380, 385 (4th Cir. 2000). In cases where the Hearing Officer and the reviewing Officer's findings are in accord, even greater deference is due to the administrative findings. See Combs v. School Bd. of Rockingham County,15 F.3d 357, 361 (4th Cir. 1994). The party seeking to overturn a state administrative officer's decision bears the burden of proof in showing that the decision was erroneous. See Barrett v. Fairfax County School Bd., 927 F.2d 146, 152 (4th Cir. 1991).

Judicial review of a state hearing officer's decisions under IDEA is two fold. See Hendrick Hudson Dist. Bd. of Educ. v. Rowley,458 U.S. 176, 206 (1982); Barnett, 927 F.2d at 151. First, the court must inquire whether the state complied with the procedures set forth under IDEA. See Rowley, 458 U.S. at 206. Second, the court must inquire whether the IEP developed through IDEA's procedures are reasonably calculated to enable the child to receive educational benefits. See id. at 207. Under the first prong, the court must determine whether the state has adopted a state plan, policies, and assurances as required by IDEA, then it must determine whether the state has created an IEP for the child in question which conforms to the requirements of a FAPE. See id. at 207 n.27.

B. Compliance under IDEA

1. Procedural Compliance

FCPS complied with the procedures required under IDEA sufficient to ensure that Kendall received a FAPE. Only procedural violations that result in a loss

of an educational opportunity to the student, or that seriously infringe on the parent's opportunity to participate in the IEP process, constitute a denial of a FAPE. See Burke County Bd. of Educ. v. Denton,895 F.2d 973, 982 (4th Cir. 1990) (stating that the procedural violation must result in a loss of an educational opportunity); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985) (showing that the procedural violation must not deny parents the opportunity to participate in the IEP process); see also W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23,960 F.2d 1479, 1484 (9th Cir. 1992) (acknowledging both propositions). The Jennings set forth the following four procedural violations which they allege operated to deny Kendall a FAPE: (a) FCPS never offered Kendall a specific placement offer in writing; (b) they were prohibited from having effective input into the IEP process because the IEP team failed to discuss or make an offer for specific school placement for Kendall; (c) FCPS failed to have a representative from the proposed schools at the December 1997 IEP meeting; and (d) FCPS pre-determined Kendall's placement for the August 1999 IEP prior to the IEP meeting. Each will be addressed in turn.

a.) Specific written placement offer

FCPS did not deny Kendall a FAPE due to the lack of a specific placement offer in writing. The Jennings argue that FCPS' placement offers are inadequate under IDEA, and thus denied Kendall a proper offer of a FAPE. Specifically, the Jennings argue that the April/June 1997 IEPs never made a recommendation for placement to Kendall. However, the record is clear

that the June 1997 IEP team and the Jennings "decided to wait till Kendall was either discharged or withdrawn from Graydon Manor before a placement decision could be made." (A.R. at 54: December 1997 IEP at 3.) The record also demonstrates that the Jennings did not properly notify FCPS that they were removing Kendall from Graydon Manor and placing her in the Hyde School. (A.R. at 119: Hearing Officer's Report at 3); (A.R. at 164: Reviewing Officer's Report at ¶ 10.) FCPS' decision to postpone a Formal recommendation for a placement offer was not a procedural violation that resulted in FCPS causing the loss of an educational opportunity. The Jennings did not inform FCPS of Kendall's stabilized condition, and that her education needs could be properly assessed. Therefore, under Denton, the effect of FCPS' decision to postpone making a written placement recommendation did not constitute a denial of a FAPE.

In addition, the Jennings argue that the December 1997 IEP is inadequate because it merely recommended placement at a private day school, even though IDEA required FCPS to make a recommendation to a particular institution. The Jennings ground their argument on the definition that an IEP includes a written statement about "the projected date for beginning of the services and modifications described in clause (iii), and the anticipated frequency, location, and duration of those services and modifications." 20 U.S.C. § 1414(d)(1)(A)(vi) (emphasis added). Despite this definition, a recommendation for a child's educational placement means a recommendation to the actual educational program and not the particular institution where the program is implemented. See Leonard v. McKenzie,869 F.2d 1558, 1562-63 (D.C. Cir. 1989)

(acknowledging that an IEP is not location specific); see also Weil v. Board of Elementary & Secondary Educ.,931 F.2d 1069, 1072 (5th Cir. 1991) (acknowledging that no change in education placement occurred when the same IEP plan was implemented yet the child was placed in a different school facility); Christopher P. v. Marcus,9I5 F.2d 794, 7136 n.1 (2nd Cir. 1990) (noting that placement refers only to the child's general program of education); Hill v. School Bd. for Pinellas County,954 F.Supp. 251, 253 (M.D. Fla. 1997) (same). Thus, in order for the school system to make a proper recommendation for placement, the school system must make a written recommendation of a specific educational program for the child. See generally Leonard, 869 F.2d at 1563. FCPS complied with this procedural requirement. On December 1997, FCPS recommended that Kendall be placed in a program for students with emotional disabilities ("E.D. program") as described in the IEP. (A.R. at 54: December 1997 IEP.) The IEP described the program as a private day school placement. (A.R. at 55: Letter from Chantilly Center Principal Sanford Robeck to the Jennings substituting page 3 of Kendall's December 1997 IEP.) Private day school placement is a term of art describing an educational program which includes several characteristics such as a small overall student body size, small classes, small facility, extensive clinical support, the ability to work individually with a student, extensive behavioral management, and parental involvement. (A.R. at 91: Hr'g Tr. at 98-103, 558, 887-91, 894-906.) Therefore, the December 18, 1997 recommendation to place Kendall in a private day school complied with IDEA's procedural requirements for a written education placement offer.

b.) Effective input into the IEP process

FCPS allowed the Jennings to have effective input into the IEP process. The Jennings argue that FCPS prohibited them from having effective input because specific schools were not discussed during the IEP meetings. The Jennings argument is legally and factually unsupported. It is true that a fundamental goal of procedural safeguards is to ensure that parents have a meaningful opportunity to participate in the IEP development. See20 U.S.C. § 1415(b). However, the Jennings point to no case law which supports the proposition that the loss of an educational opportunity due to a procedural violation occurs when the parents are present at the IEP meetings and the IEP team discusses education programs for their child during such meetings. Moreover, the facts of this case show that the Jennings, and their attorney, fully participated in the meetings where the IEP team developed an educational plan for Kendall. (A.R. at 32, 54, 126: April, June, and December 1997 IEPs.) The Jennings' presence at the IEP meetings, and the discussions that resulted from such meetings, complied with IDEA's procedural requirements that parents have effective input into their child's placement decision. Therefore, the Jennings' alleged lack of input into the IEP process does not operate to negate FCPS' placement offer.

c.) Proper representatives at the IEP meeting

FCPS abided by the procedural safeguard of having appropriate representation at the December 1997 IEP meeting. The Jennings argue that FCPS' failure to have a representative of the proposed private day schools at the meeting was a procedural requirement under IDEA

that FCPS failed to meet. However, the Jennings fail to cite to any law stating that a representative of the proposed school must be present at the IEP meeting, and that such failure would result in the loss of an educational opportunity. See Denton, 895 F.2d at 962. The Code of Federal Regulations provides that when developing a child's IEP, the state agency should ensure that a representative of the private school or facility attends the meeting. See34 C.F.R. § 300.349. If the representative cannot attend, the agency should use other methods to ensure participation by the private school or facility. See id. The goal of having a proposed school representatives present is to ensure that the proposed placement is tailored to meet the child's needs. See generally W.G., 960 F.2d. at 1484 (noting the importance of certain individuals attendance at IEP meetings in order to ensure an appropriate IEP). The Court agrees with he Reviewing Officer's findings that the December 1997 IEP "meeting had sufficient and varied personnel present." (A.R. at 164: Reviewing Officer's Report at ¶ 19.) The record is clear that Mr. John Romac, the director of studies at the Hyde School, was present via speaker phone at Kendall's December 1997 IEP. (A.R. at 54: December 1997 IEP at 2.) In addition, Ms. Deirdre Lavery, the school system's contract services representative, was present at the meeting and was fully familiar with the relevant private day programs. (A.R. at 91: Hr'g Tr. at 901.) Ms. Lavery's duties involve visiting the schools, negotiating placements, and being knowledgeable about the various private day schools' resources. (Id.) Ms. Lavery and Mr. Romac's presence, in addition to the others in attendance,1 sufficiently ensured the development of an IEP that was tailored to Kendall needs. Therefore, FCPS had the proper representatives

at the December 1997 IEP meeting in order to comply with IDEA.

d.) Placement pre-determination for August 1999 IEP meeting

FCPS properly evaluated Kendall prior to recommending educational placement during the August 1999 IEP meeting. The Jennings contend that FCPS denied Kendall a FAPE by failing to properly evaluate her prior to recommending placement. Specifically, they contend that the IEP team pre-determined placement for her at the Woodson Center, even though the team did not have a present knowledge of Kendall's present level functioning. A reevaluation should be conducted if the "conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation, but at least once every 3 years. ..." See20 U.S.C. § 1414(a)(2)(A). It is undisputed that an evaluation committee evaluated Kendall in 1997 for special education services. (A.R. at 164: Reviewing Officer Report at ¶ 9.) The Jennings did not request a reevaluation prior to the August 1999 IEP meeting, nor does the record reflect the presence of conditions that would warrant a reevaluation of Kendall. (A.R. at 164: Reviewing Officer's Report at ¶ 16.) Thus, the August 1999 IEP team could have based their assessment, part, on the 1997 evaluation because such assessment came within three years of Kendall's last evaluation. Therefore, the August 1999 IEP placement offer was not nullified due to a failure of FCPS to properly reevaluate Kendall.

Moreover, the record indicates that the IEP team did conduct a thorough assessment of Kendall's placement needs at the August 1999 IEP meeting. During the

August 1999 IEP meeting, the team reviewed Kendall's previous IEPs, assessed her classroom performance, discussed her short term objectives and annual goals, and considered a variety of education services for Kendall. (A.R. at 126: August 1999 IEP.) The Jennings only point to a trunacated time frame in order to suggest that FCPS failed to comply with their responsibilities under IDEA. However, as stated above, FCPS complied with the timing requirements for Kendall's reevaluations. Ultimately, the Jennings do not sustain their burden of showing that the August 1999 IEP team failed to comply with IDEA's procedural requirements. A truncated time frame alone is not sufficient to show that the IEP team failed to comply with IDEA's procedural requirements of properly evaluating and assessing Kendall. Therefore, FCPS' assessment of Kendall did not result in a procedural violation under IDEA.

2. Substantive Compliance

FCPS offered Kendall a FAPE. A FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." See Rowley, 458 U.S. at 188-89. This standard is satisfied when the state provides personalized instruction with sufficient support services to permit the child to benefit educationally from that institution. See id. at 187. As explained above, in December 1997, FCPS recommended that Kendall be placed in a private day school. In addition, in August 1999, FCPS made a placement offer at the Woodson Center for Kendall. The Reviewing Officer found that the private day

school and Woodson Center placements were appropriate facilities which were reasonably calculated to offer Kendall educational benefits. (A.R. at 164: Reviewing Officer Report at ¶¶ A, C.) The record support the Reviewing Officer's finding. Kendall needed the least restrictive educational program for students with emotional disabilities that would prepare her for college. The recommended private day schools offered small classes, extensive individual attention, structure and clinical support, experienced trained in special education and emotional disabilities, and many advanced level mathematics, science, and foreign language courses. (A.R. at 135: Oct. 1999 Hr'g Tr. at 64-69, 93-96); (A.R. at 91: Hr'g Tr. at 97-100, 889-91.) The Woodson Center offered clinical support, advanced level college preparatory classes, the opportunity for a smooth transition from a small residential setting to a larger college setting, and a special education program designed for students with emotional disabilities. (A.R. at 135: Oct. 1999 Hr'g Tr. at 143-48, 205-12.) The Jennings present no evidence to demonstrate that either placement programs was insufficient to provide Kendall with an appropriate education. Therefore, FCPS properly offered KendalI a FAPE in compliance with IDEA.

C. Reimbursement under IDEA

The Jennings are not entitled to tuition cost reimbursement from FCPS for sending Kendall to Graydon Manor and the Hyde School. Parents are entitled to retroactive reimbursement for sending their child to a private school only when the state denies their child a FAPE. See20 U.S.C. § 1412(a)(10(C); Burlington School Comm. v. Department of Educ.,471

U.S. 369, 369-79 (1985); Leonard, 869 F.2d at 1560. Each questioned school and school year will addressed in turn.

1. Spring 1997 at Graydon Manor

The Jennings are not entitled to further reimbursement from FCPS for sending Kendall to Graydon Manor. IDEA only requires the reimbursement of appropriate educational services. See20 U.S.C. § 412(a)(10)(C). The Jennings placed Kendall in Graydon Manor from April 1997 until August 1997. During this time, Graydon Manor provided Kendall with numerous services including mental health and substance abuse treatment services: many of the services provided were not educational in nature. (A.R at 164: Reviewing Officer's Review at ¶ 9.) It is undisputed that FCPS reimbursed the Jennings with $8,440 for the educational services Kendall received from Graydon Manor. (Id. at ¶ 8.) The Jennings point to no evidence which indicates that Graydon Manor provided Kendall with education services which exceeded this amount. Accordingly, the Jennings are not entitled to further reimbursement from FCPS for the expenses they incurred sending Kendall to Graydon Manor.

2. The Hyde School 1997-1998 and 1998-1999 school years

The Jennings are not entitled to reimbursement from FCPS for sending Kendall to the Hyde School for the 1997-1998 and 1998-1999 school years. Parents are entitled to retroactive reimbursement for sending their child to a private school only when the state denies their child a FAPE. See 20 U.S.C. §

1412(A)(10)(C);Florence County School Dist. v. Carter,510 U.S. 7, 15 (1993). However, reimbursement to parents who unilaterally place their child in private programs may be reduced or denied

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa).

20 U.S.C. § 1412(a)(10)(C)(iii)(I). In addition, if a school system offers a child a FAPE, and the parents reject such offer, then the parents are not entitled to reimbursement under IDEA. See Leonard, 869 F.2d at 1560.

First, the Jennings are not entitled to reimbursement for Kendall's initial months at the Hyde School because the Jennings failed to inform FCPS of their decision to place Kendall in the Hyde School prior to placing her in such institution. During the June 1997 IEP, it was the consensus of the team that services required by Kendall were not educational in nature. (A.R. at 54: December 1997 IEP at 3). Prior to sending Kendall to the Hyde School, the Jennings did not inform the IEP

team of their intent to place Kendall at the school, nor did they inform FCPS of their intent to seek reimbursement for such placement. (A.R. at 164: Reviewing Officer Report at ¶ 10). Therefore, under § 1412(a)(10)(C)(iii)(I), the Jennings are barred from now seeking reimbursement for education services during the fall 1997 school semester.

Second, the Jennings are not entitled to reimbursement for the remainder of the 1997-1998 and 1998-1999 school years at the Hyde school. As explained earlier, during the December 1997 IEP meeting, FCPS offered Kendall a FAPE. Nonetheless, Kendall's father, Mr. Bruce Jennings, rejected this offer. Mr. Jennings' rejection of this offer is clearly evidenced by his signature on the December 1997 IEP stating that he did not agree with the recommendations proposed in the IEP.2 (A.R. at 54: December 1997 IEP.) In addition, the testimony of Kendall's mother, Ms. Lauren Jennings, affirms such rejection. Ms. Jennings unequivocally stated that she rejected the proposed December 1997 IEP plan for private day placement. (A.R. at 91: Hr'g Tr. at 825-26.) Accordingly, under Carter and Leonard, the Jennings are not entitled to reimbursement for tuition costs under IDEA for sending Kendall to the Hyde School from September 1997 to May 1999. See Carter, 510 U.S. at 15; Leonard, 869 F.2d at 1560.

3. The Hyde School 1999-2000 school year

The Jennings are not entitled to cost reimbursement from FCPS for sending Kendall to the Hyde School for the 1999-2000 school year. As stated earlier, under Carter, parents are entitled to retroactive

reimbursement for sending their child to a private school only when the state denies their child a FAPE. See Carter, 510 U.S. at 15. It is undisputed that during the August 1999 IEP meeting, FCPS offered Kendall placement at the Woodson Center. (A.R. at 126: August 1999 IEP.) The record demonstrates that the Woodson Center was reasonalbly calculated to offer Kendall an educational benefit. (A.R. at 164: Reviewing Officer Report at ¶ C.) Mr. Bruce Jennings rejected the offer, stating that he did not agree with the contents of the IEP. (A.R. at 126: August 1999 IEP.) Accordingly, under Carter and Leonard, the Jennings are not entitled to reimbursement for the cost of sending their child to the Hyde School for the 1999-2000 school year.

III. Conclusion

For the foregoing reasons, this Court holds that FCPS complied with the requirements of IDEA, and properly offered the Jennings a FAPE for Kendall. The Jennings unequivocally rejected the offers for a FAPE placement. Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is GRANTED;
ORDERED that Plaintiffs' Motion for Summary Judgment is DENIED; and
ORDERED that Judgment is ENTERED in favor of Defendant Fairfax County School Board.

1Others present at Kendall's December 1997 IEP meeting included: (1) Ms. Lauren Jennings, mother; (2) Mr. Bruce Jennings, father; (3) Ms. Margaret McMichael, aunt/school psychologist; (4) Ms. Elise Tripp, psychologist; (5) Ms. Rhonda Weiner, education

teacher; and (6) Mr. John McGeehan, the Jennings' attorney. (A.R at 64: December 1997 IEP.)

2On December 18, 1997, Mr. Bruce Jennings signed the proposed IEP which stated

I DO NOT AGREE with the contents and recommendations of the proposed IEP. I have been informed of my due process rights. I understand that I have the right to review my child's records. I understand that I have the right to refuse this permission and to have my child continue in the present placement until due process procedures are exhausted. I HAVE _____ / HAVE NOT _____ participated in the development of my child's IEP.
(A.R. 54: December 1997 IEP.)

20 U.S.C. § 1401(9)

(9) **Free appropriate public education**
The term "free appropriate public education" means special education and related services that—
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414 (d) of this title.

20 U.S.C. § 1414(d)(1)(A)

(d) **Individualized education programs**
(1) **Definitions**
In this chapter:
(A) **Individualized education program**
(i) In general The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—
(I) a statement of the child's present levels of academic achievement and functional performance, including—
(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;
(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and
(cc) for children with disabilities who take alternate

assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in

subclause (IV)(cc);
(VI)
(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412 (a)(16)(A) of this title; and
(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—
(AA) the child cannot participate in the regular assessment; and
(BB) the particular alternate assessment selected is appropriate for the child;
(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and
(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—
(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;
(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and
(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415 (m) of this title.
(ii) Rule of construction Nothing in this section shall be

construed to require—

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

20 U.S.C. § 1415(j)

(j) **Maintenance of current educational placement**

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

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No. 07-541

IN THE
SUPREME COURT OF THE UNITED STATES

ALEXANDRIA CITY SCHOOL BOARD,
Petitioner

v.

A.K., A MINOR BY HIS PARENTS AND NEXT FRIENDS J.K. AND E.S.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

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v.

A.K., A MINOR BY HIS PARENTS AND NEXT FRIENDS J.K. AND E.S.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The National School Boards Association ("NSBA"), the American Association of School Administrators ("AASA") and the National Association of State Directors of Special Education ("NASDSE") move this Court pursuant to Supreme Court Rule 37.2(a) for leave to participate as *amici curiae* herein for the purpose of filing the attached brief.

In support of their motion, *amici* state the following:

1. Counsel of record for both parties have received timely notice of *amici*'s intent to file the attached brief as required under Supreme Court

Rule 37.2(a). Petitioner has consented to the filing of the brief, and Respondents have declined consent.

2. The National School Boards Association is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 55 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

3. The American Association of School Administrators, founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

4. The National Association of State Directors of Special Education is a not-for-profit organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education in all 50 states. NASDSE's primary mission is to serve students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities. NASDSE provides important resources to educators that help improve and enhance the quality of special education services

and related curricula provided to students with disabilities. NASDSE's members are accountable for the proper implementation of the Individuals with Disabilities Education Act ("IDEA") and have responsibility under the law for general supervision of local school district implementation of the IDEA, which includes ensuring that Individualized Education Programs ("IEPs") are written within specific timeframes and include specific information and that services described in an IEP are delivered as prescribed in that document.

6. In light of *amici*'s longstanding involvement with special education issues, including advocacy before this Court and Congress, and the special expertise their members bring to bear on these issues, *amici* are well qualified to advise the Court of the importance of accepting this case for review given the Fourth Circuit's departure from the weight of precedent, regulatory interpretation and the collaborative intent of the law. In addition, *amici* are uniquely positioned to inform this Court of the negative impact the Fourth Circuit's decision, if allowed to stand, will have on the delivery of special education and related services to children with disabilities. This Court itself has recognized that under the (IDEA), 20 U.S.C. § 1400 *et seq.*, school officials, in light of their educational expertise, have special responsibility in carrying out the law.

For these reasons, NSBA, AASA and NASDSE respectfully urge this Court to allow them to provide additional information that will assist the Court in determining the need to review this case,

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 55 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

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[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. S. Ct.R. 37.6. Counsel of record for both parties received timely notice of *amici's* intent to file this brief. Petitioner has consented to the filing of this brief, and Respondent has declined consent. *Amici* have submitted herewith a motion for leave to file this brief pursuant to Supreme Court Rule 37.2(a).

The National Association of State Directors of Special Education (NASDSE) is a not-for-profit organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education in all 50 states. NASDSE's primary mission is to serve students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities. NASDSE provides important resources to educators that help improve and enhance the quality of special education services and related curricula provided to students with disabilities. NASDSE has a particular interest in this case because our members are accountable for the proper implementation of the Individuals with Disabilities Education Act ("IDEA"). NASDSE's members have responsibility under the law for general supervision of local school district implementation of the IDEA, which includes ensuring that IEPs are written within specific timeframes and include specific information and that services described in an IEP are delivered as prescribed in that document.

Recognizing that all children, including those with disabilities, have a right to be provided with free appropriate public education, *Amici* have consistently supported the rights of disabled children, while at the same time being particularly concerned over the significant amount of funds expended by their members every year above and beyond that provided by the Federal Government

for the education of those children.[2] The growth in the number of children who attend non-public schools at public expense has increased this burden.[3]

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's ruling threatens the collaborative process and ignores the practical realities underlying the development of Individualized Education Programs (IEPs) for children with disabilities.

There are presently over 6 million students, or 12.8 percent of the total public school population, who are being educated pursuant to IEPs collaboratively created by school officials and parents under the Individuals with Disabilities

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[2] While the Federal Government committed to funding 40 percent of the cost per pupil for special education when it first enacted the predecessor statute to IDEA in 1974, it currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than $59 billion for the last four fiscal years. NSBA, *Federal Funding for Education* at 2 (Mar. 2006), *available at* http://www.nsba.org/site/docs/35100/35033.pdf.

[3] According to the National Center for Educational Statistics, the number of private schools with a special education emphasis grew from 1059 in 1989-90 to 1634 in 2003-2004. *Characteristics of Private Schools in the United States: Results from Private School University Survey* (2004), *available at* http://nces.ed.gov/surveys/pss/. This reflects the growing number of non-public placements to which public schools have assigned students whose disabilities cannot be adequately addressed through the programs and services available in the public school system.

Education Act, 20 U.S.C. § 1400 *et seq.* (2005) ("IDEA") to address a vast variety of physical, mental, and learning disabilities ranging from cognitive disabilities to autism.[4] Where members of the IEP team collectively conclude that the school district is unable to provide adequate educational or related services to address a child's needs, the team may recommend that those services be provided by a private school. Non-public placements are generally made through a process that involves sending the child's educational history and completed IEP to a variety of local area private schools, each of which must then determine if the child is a proper fit for the programs offered by that school.

Parents are then encouraged to visit the proposed schools, which almost universally insist upon an interview with both the child and parents before making a final offer of placement. After the interview private schools always have the discretion to accept or reject a child that applies for enrollment. Thus, an IEP cannot prescribe enrollment at a specific private school because final admissions decisions are not available at the time the IEP is developed. In fact, a completed IEP describing the child's needs and the appropriate setting is viewed as a crucial element of the admissions process since it informs private schools of the child's needs necessitating a private setting

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[4] National Center for Education Statistics, Table 1.11 (Number and percentage of public school students with Individual Education Programs (IEP), by locale: 2003-04), NCES 2007-040 (June 2007), *available at* http://nces.ed.gov/pubs2007/ruraled/tablestable1_11.asp.

as well as the services that the school would be expected to provide to the child. An IEP that is not tied to one specific school recognizes the realities of this process. Naming a particular school that ultimately does not accept the child or ultimately does not work out for other reasons would necessarily require reconvening an IEP meeting in every such case to rewrite the IEP, thereby draining the time and resources of the school district and requiring parents to attend more meetings to repeat the IEP process, possibly numerous times.

In the *A.K.* case, as is typical in thousands of IEP team meetings conducted in school districts each and every week, the team determined that A.K. would be best served in a "private day school" setting (J.A. 379, 1103-04, 1108). The words "private day school" appearing in A.K.'s IEP, in turn, were described by the District Court as "a term of art describing an educational program which includes several characteristics such as a small overall student body size, small classes, small facility, extensive clinical support, the ability to work individually with a student, extensive behavioral management, and parental involvement." *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 676, n.1 (4th Cir. 2007), App. 16a, n.1. Yet as is typical in situations where one or more schools were deemed potential matches for the child, the IEP did not include the precise name of the school at which the child would be assigned, thereby giving the parents a choice of at least two therapeutic private day schools, both of which the school district staff believed could implement the IEP. (JA 620, 635).

Indeed, the hearing examiner who initially heard the instant case as well as the U.S. District Court concluded that both placements proposed by the IEP team were capable of meeting A.K.'s needs. The parents, however, rejected both proposed schools based upon their subjective belief that neither was appropriate (JA 1186) and refused to cooperate in the interview process, instead choosing to place A.K. unilaterally in a private residential school located in another state, with a substantially higher cost to the school district.

The Fourth Circuit opinion concedes that the IEP team, which included the child's parents, identified at least two local area private schools deemed capable of meeting A.K.'s needs, finding fault only with the failure of the team to put the name of a specific school into the IEP. Based solely upon that alleged procedural default, the count asserts the novel proposition that "the offer of an unspecified 'private day school' was essentially no offer at all," and thus deprived A.K. of the free appropriate public education ("FAPE") to which the IDEA entitles him. 484 F.3d at 682, App. 15a. With seemingly little regard for the severe impact its decision could have on the thousands of school districts that develop IEPs in a similar manner, the Fourth Circuit gave cold comfort, stating "we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided." *Id.* The Fourth Circuit's rationale that there was a denial of FAPE here because "the parents express doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP describes," *id.*, simply

invites parents to not participate meaningfully in the required interview process for private schools—exactly as occurred here—to create a claimed denial of FAPE that they could pursue through the due process procedures that the IDEA makes available to parents who do not agree with their child's proposed IEP.[5] Under the Fourth Circuit's decision, the parents would no longer, as this Court ruled in *Schaffer v. Weast*, 546 U.S. 49 (2005), bear the burden of proving that the IEP failed to provide FAPE and school officials would no longer be entitled to the presumption that they are "properly performing their difficult responsibilities under this important statute." *Id.* at 63 (Stevens, J., concurring). Instead, it would be a foregone conclusion that the district failed to provide FAPE whenever the parents expressed doubt that the IEP goals could be met at any school suggested by the district.

Thus, the Fourth Circuit's opinion now subjects thousands of IEPs to the risk of being found materially flawed if they fail to include the name of a specific private school. If, as in this case, an IEP team suggests that more than one private school may be able to provide services to a child with a disability who requires placement in a private school, parents who have in mind another school for their child have no incentive to cooperate with the admissions and interview process, knowing that instead they could unilaterally place their child in a private school and then initiate a due process hearing request in which a hearing officer would

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[5] 20 U.S.C. § 1415 (2005).

likely feel compelled under the Fourth Circuit's decision to rule in their favor. Besides discouraging meaningful collaboration, the Fourth Circuit's ruling forces school districts to rush to place into the IEP the name of a school that may or may not be a true match for the child, simply to avoid being accused of making "no offer at all." *Id.* This practice exalts form over substance and does not ultimately serve the interests of the child.

It was out of concern for this anticipated result that Judge Roger Gregory strongly dissented from both the majority opinion and the decision of the other Fourth Circuit judges denying rehearing *en banc*:

> It is difficult to understand how A.K. could have lost educational opportunity on account of the omission of the schools' names from his IEP when his parents understood both [local private] schools were under consideration and had already expressed that neither was appropriate for their son.

A.K., 484 F.3d at 686. The prospect of the majority decision becoming the law of the land would present additional burdens for school districts attempting in good faith to offer appropriate educational opportunities for children with disabilities:

> Under our present jurisprudence, public school districts are vulnerable to those who could use the unclear state of the law to their advantage. In

> particular I worry that public schools could be liable for large sums because of errors that, as here, have no adverse impact on the quality of the educational program made available to the student. Regrettably, our public schools today face greater social challenges than before with ever shrinking financial resources; and we should be careful not to expose them to a greater burden than Congress intended them to bear.

A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 497 F.3d 409 *reh'g denied*, (4th Cir. 2007) (Gregory, J., dissenting from denial of rehearing en banc).

What the Fourth Circuit failed to appreciate is that the IDEA is purposely designed to foster the development of IEPs through a collaborative process that includes the child's parents and encourages resolution of disputes through non-adversarial means such as mediation and resolution hearings.[6] When these measures fail to result in an agreement between the parties, and parents have chosen to place their children unilaterally in a private school of their own choosing, the law mandates that they meet specific requirements[7] before being entitled to seek tuition reimbursement through due process and, if necessary, court proceedings in which they would bear the burden of proving that the school district failed to provide FAPE. The statute does not

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[6] 20 U.S.C. § 1415(e), (f)(1)(B) (2005).

[7] 20 U.S.C. § 1412(a)(10)(C) (2005).

contemplate—as the Fourth Circuit's ruling appears to allow through its narrow and erroneous interpretation of one provision—that parents can simply refuse to cooperate in good faith in the IEP process and ultimately obtain at public expense their preferred placement for their child without any burden of proof whatsoever. By subverting the collaborative framework set forth in the IDEA, the Fourth Circuit's ruling will ensure that there will be more high cost litigation of due process complaints when what is intended to be a cooperative process breaks down. *Schaffer*, 546 U.S. at 59.

Should this Court fail to correct the Fourth Circuit's flawed reasoning in this case, IEP teams will rush to identify possibly inappropriate placements simply to avoid the risk of being found responsible for a "substantive" violation of FAPE. Under long-existing regulations promulgated by the Office of Special Education and Rehabilitative Services ("OSERS") governing the determination of placement for special education programs, a "child's placement" should be "based on the child's IEP; and [be] as close as possible to the child's home." 34 C.F.R. § 300.116(b)(2), (3) (2006). The Fourth Circuit's ruling in this case violated both concepts, by compelling the Petitioner to fund a residential placement far from home, providing services and programs that the IEP team did not feel were based on A.K.'s IEP. What the Fourth Circuit appears to have forgotten is that for a school district to comply with the foregoing regulation, it is the IEP that should govern the placement, and not the other way around. Allowing the Fourth Circuit's decision to stand will turn that concept on its ear, hastening placement decisions that are not driven by the

needs of the child and the services prescribed under that child's IEP, and potentially resulting in placing a greater number of children in schools far from their home.

II. The Fourth Circuit ignores the U.S. Department of Education's interpretation of "location" upon which school officials have properly relied in developing IEPs.

Under the IDEA an IEP must include "the projected date for the beginning of the services and modifications . . . and the anticipated frequency, location, and duration of those services and modifications" 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (2005). The U.S. Department of Education has interpreted the word "location" to mean the type of environment (such as regular classroom, separate resource room, etc.) *within* a school, rather than the identity of a specific school:

> The "location" of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?

64 Fed. Reg. 12594 (March 12, 1999) (commentary to regulations implementing 1997 amendments to IDEA). Petitioner cites a number of Office of Special Education Programs ("OSEP") opinions that

apply this interpretation to the word "location," in recognition of the not infrequent reassignment of students during the life of their IEP for such reasons as: 1) the transfer of an educational program from one classroom or even one school building to another; 2) the departure of a teacher assigned to a particular special education class, requiring the school district to reassign the students elsewhere; 3) the relocation of pull-out services (such as speech-language or physical therapy) from the child's classroom to another location in the school or even to an after-school facility deemed more suitable for delivering those services; 4) a child's "graduation" from elementary to middle school, or from middle to high school;[8] 5) the transfer of children from a classroom led by a teacher deemed not to be "highly qualified" under the No Child Left Behind Act ("NCLB")[9] to a classroom (or school) where the teacher meets that requirement of the law; 6) the transfer of children from a school that has consistently failed to make

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[8] *See, e.g., John M. v. Board of Educ. of Evanston Twp. High Sch. Dist. 202,* 502 F.3d 708 (7th Cir. 2007) (reviewing authority from various circuits in interpreting "'educational placement' to incorporate enough flexibility to 'encompass [the child's] experience" and that "[w]hen a child progresses from preschool to elementary school, from elementary school to middle school or from middle school to high school, the 'status quo no longer exists'"), *quoting Board of Educ. of Community High Sch. Dist. No. 218 v. Illinois State Bd. of Educ.,* 103 F.3d 545 (7th Cir. 1996); *Ms. S ex rel. G v. Vashon Island Sch. Dist.,* 337 F.3d 1115 (9th Cir. 2003).

[9] 20 U.S.C. § 6301 *et seq.* (2002).

annual yearly progress,[10] or is deemed to be "persistently dangerous;"[11] and 7) the transfer of a program due to renovations or other activities in the school that interfere with the program's success.[12]

The Fourth Circuit's rejection of the administrative agency's interpretation of the ambiguous word "location" found in the statute flies in the face of this Court's longstanding

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[10] 20 U.S.C. § 6316(b)(1)(E) (2002). This provision of the NCLB offers students "the option to transfer to another public school served by the local educational agency, which may include a public charter school, [where the home] school has been identified for school improvement . . . " *See also* 20 U.S.C. § 6316(b)(1)(F) (2002) ("Students who use the option to transfer under subparagraph (E) . . . shall be enrolled in classes and other activities in the public school to which the students transfer in the same manner as all other children at the public school."). This reflects the need to insure replication of educational opportunities, services, and treatment, regardless of the individual location of the school that a child attends. This same guarantee—of replicated services wherever a child attends—was all Congress intended in its reference to "location" in the IDEA. The Fourth Circuit opinion gives this term too narrow a reading and utterly ignores the adjective "anticipated" that describes the word "location" in the statute. This Court has long held that no words contained in a statute are to be presumed to be superfluous. *See, e.g., Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 126 S.Ct. 2455 (2006). For more discussion, see section III. *infra* at 16.

[11] 20 U.S.C. § 7912 (2002). Imagine the absurdity of requiring affirmative approval by the IEP team convened for the sole purpose of honoring a parent's statutory right to insist that his or her child be relocated to an identical educational program from a school deemed to be "persistently dangerous" under this provision of the NCLB. The Fourth Circuit's majority's reasoning in *A.K.* would necessitate this needless practice under these circumstances.

[12] 20 U.S.C. § 1401(10)(A), (B) (2005).

jurisprudence. *See, e.g., Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984). As this Court only recently reaffirmed, "if the language of the statute is open or ambiguous—that is, if Congress left a 'gap' for the agency to fill—then we must uphold the Secretary's interpretation as long as it is reasonable." *Zuni Pub. Sch. Dist. No. 89 v. Department of Educ.*, 127 S. Ct. 1534, 1540 (2007). "This is an absolutely classic case for deference to agency interpretation." *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005). In *A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674 (4th Cir. 2004), the Fourth Circuit did, in fact defer to this regulatory interpretation in holding that transferring a student to a different classroom in the school did not change the child's "educational placement" for purposes of the so-called "stay-put" provision of the IDEA.[13] In the instant case, the Fourth Circuit ignored its own decision just a few years ago that recognized such deference is in order.

In short, this Court should accept this case for consideration to reinforce to the lower courts and, by extension, to the thousands of due process hearing officers considering IDEA cases across the U.S., that school districts properly relying upon the administrative agency's interpretation of ambiguous statutory language should not be found to have violated the IDEA. To allow the Fourth Circuit's decision to stand invites the chaos of challenges

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[13] The "stay-put" provision of the statute prescribes that a student's "educational placement" will not change while disciplinary proceedings are pending against a student receiving special education services. 20 U.S.C. § 1415(j) (2005). *See Honig v. Doe*, 484 U.S. 305 (1988).

being launched to literally hundreds of thousands of IEPs that fail to identify specific school locations. It is manifestly unfair to charge well-meaning, highly knowledgeable educators who serve on IEP teams and who strive to provide FAPE to the most challenged special education students with denying those children adequate educational services merely because they have relied, in good faith, on an agency interpretation that is consistent with the statute and that recognizes the complexities of placing children in non-public educational facilities over which local boards of education have little control. Furthermore, this would strain the resources of state education agencies that have responsibility for ensuring that local school districts provide FAPE and would require the state agency to review thousands of IEPs to ensure their compliance with this new requirement.

III. The Fourth Circuit's decision ignores well established precedent from lower courts, and not yet addressed by this Court, distinguishing *de minimus* procedural violations of the IDEA from more serious substantive violations.

Compounding its erroneous interpretation that the "location" of services listed in a child's IEP is the equivalent to an "educational placement" specifying a particular school, the Fourth Circuit converts what could be at most a *de minimus* procedural violation of the IDEA into a substantive violation. The IDEA's requirement that an IEP set

forth "the anticipated frequency, location, and duration of services"[14] is a procedural requirement that addresses "practical, logistical considerations"[15] of a geographic nature that is relevant to concerns of scheduling and transportation, rather than an educational placement decision which goes to the heart of the child's instructional setting. With that in mind, given that the IDEA only requires the listing of the *"anticipated"*[16] location of services, other circuits have held that this requirement is procedural rather than substantive and that it is subject to change without changing the IEP itself.

In *Leonard v. McKenzie*, 869 F.2d 1558 (D.C. Cir. 1989), the United States Court of Appeals for the District of Columbia Circuit reasoned that, "This court has clearly held that '[a]n IEP is not location-specific; the place at which an IEP is implemented may change without the IEP itself changing.'" *Id.* at 1562-63, *citing Abney v. District of Columbia*, 849 F.2d 1491, 1492 n. 1 (D.C. Cir. 1988). Similarly, the United States Court of Appeals for the Fifth Circuit in *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003), urged that the term "'[e]ducational placement', as used in the IDEA, means educational program—not the particular institution where that program is implemented." *Id.* at 379, *citing Sherri A.D. v. Kirby*, 975 F.2d 193 (5th Cir. 1992) ("educational placement" is not a place, but a program of services); *Weil v. Board of Elem. & Secondary Educ.*, 931 F.2d 1069 (5th Cir. 1991),

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[14] 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (2005).

[15] *A.K.*, 484 F.3d at 683.

[16] 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (2005) (emphasis added).

cert. denied 502 U.S. 910 (1991) (transfer of child to another school was not a change in "educational placement"). The Fifth Circuit in *White* thus reasoned that, contrary to the parents' position, the IDEA's requirement "that parents must be involved in determining 'educational placement' does not necessarily mean they must be involved in site selection." *White*, 343 F.3d at 379.

Explaining further its decision that the "location" of services is an administrative decision separate and apart from the determination of "educational placement," the Fifth Circuit in *White* relied upon similar reasoning expressed by the United States Department of Education's Office of Special Education Programs to the effect that "[a]dministrative agency interpretations of the regulations confirm that the school has significant authority to select the school site, as long as it is educationally appropriate." *Id.* at 382. To that end, the Fifth Circuit noted as follows:

> The Office of Special Education Programs (OSEP), the Department of Education branch charged with monitoring and enforcing the IDEA and its implementing regulations, has explained:
>
> [I]f a public agency . . . has two or more equally appropriate locations that meet the child's special education and related services needs, the assignment of a particular school . . . may be an administrative determination, provided that the

> determination is consistent with the placement team's decision. *Letter from Office of Special Education Programs to Paul Veazey* (26 Nov. 2001). *See also, e.g., Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (it is permissible for a student with a disability to be transferred to a school other than the school closest to home if the transfer school continues to be appropriate to meet the individual needs of the student); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994) (citing policy letter indicating that assignment of a particular location is an administrative decision).

343 F.3d at 382. *Accord Weil*, 931 F.2d at 1072 (concluding that a "change of schools . . . was not a change in 'educational placement'"); *Christopher P. v. Marcus*, 915 F.2d 794, 796 n.1 (2d Cir. 1990), *cert. denied*, 498 U.S. 1123 (1991) (noting that "[t]he regulations implementing the Act interpret the term 'placement' to mean only the child's general program of education.").

The Fourth Circuit decision stands in stark contrast to other circuit court decisions across the country holding that the "location" of special educational services is an administrative determination separate and apart from the child's "educational placement." Petitioner's failure to specify the specific school where A.K. would receive services was, if a flaw at all, a procedural one that had no substantive impact on A.K.'s right to FAPE.

Earlier Fourth Circuit decisions, as well as decisions from other circuits, have consistently reaffirmed this conclusion. The issue of whether procedural violations rise to the level of a denial of FAPE thus supporting a parent's unilateral placement was addressed by the Fourth Circuit in *Dibuo v. Board of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir. 2002). In that case, the court reasoned that, "under well-established circuit precedent,"[17] there can be no "finding that a school district failed to provide a disabled child with a FAPE when the procedural violation *did not actually interfere* with the provision of a FAPE to that child." *Id.* (emphasis in original).

On this point, other circuits are in accord. For example, in *N. L. v. Knox County Sch.*, 315 F.3d 688 (6th Cir. 2003), the United States Court of Appeals for the Sixth Circuit expressed the following reasoning:

> [A] procedural violation of the IDEA is not a per se denial of a FAPE [free appropriate public education]; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of FAPE only if such violation causes substantive harm to the child or his parents. Substantive harm occurs

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[17] *See, e.g., M.M v. School Dist. of Greenville County*, 303 F.3d 523, 533-534 (4th Cir. 2002); *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997); *Briley v. Board of Educ. of Baltimore County*, 87 F. Supp.2d 441, 444 (D. Md. 1999).

> when the procedural violations in question *seriously infringe* upon the parents' opportunity to participate in the IEP process.

Id. at 693 (emphasis added). *See M.L. v. Federal Way Sch. Dist.,* 394 F.3d 634, 653 (9th Cir. 2005) (Gould, J., concurring opinion), *citing W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23,* 960 F.2d 1479, 1484 (9th Cir. 1992) (alleged procedural errors constituted a denial of FAPE only when they result in the loss of educational opportunities or when they significantly restricts parental participation in the IEP process).

Similarly, in *Adam J. v. Keller Indep. Sch. Dist.,* 328 F.3d 804, 811 (5th Cir. 2003), the Fifth Circuit addressed a "litany" of alleged procedural violations that, according to the parents; had the effect of denying them "full participation." In rejecting the parents' argument that the alleged procedural violations constituted a denial of FAPE, the court cited with favor the other circuit opinions holding that procedural violations have no substantive impact and are not a denial of FAPE:

> The other circuits that have addressed this question head on have consistently held that "procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity," but to date we have never formally adopted or rejected this approach. We do so today.

Id. at 811-812, *citing DiBuo v. Board of Educ.*, 309 F.3d 184, 190 (4th Cir. 2002); *T.S. v. Independent Sch. Dist. No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001); *W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992).

Thus the weight of circuit authority conflicts with the Fourth Circuit's decision that the omission of the name of a specific institution constituted a substantive denial of FAPE. In fact, A.K.'s parents had meaningful opportunities to participate in the development of the approved IEP and knew the private day schools contemplated by the Petitioner but failed of their own accord to bring A.K. for any interviews. Indeed, A.K.'s parents had already contracted with their residential school of choice for the upcoming school year in advance of A.K.'s IEP meetings, having pre-determined, without the benefit of any interviews, that none of the schools recommended by the Petitioner were appropriate. 484 F.3d at 686. Accordingly, the failure to specify the specific anticipated location of services in A.K.'s IEP was at most a minimal procedural flaw (if one at all) and should not have resulted in the Fourth Circuit finding that there was a denial of FAPE, thereby entitling the child to receive services at a private residential school at public expense.

Such a holding is at odds not only with earlier Fourth Circuit precedent but also with the weight of authority across the country. *See, e.g., White ex rel. White v. Ascension Parish Sch. Bd., supra* (5th Cir.); *Adam J. v. Keller Ind. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003); *Leonard v. McKenzie*, *supra* (D.C. Cir.); *C.J.N. v. Minneapolis Pub. Sch.*, 323 F.3d 630 (8th

Cir. 2002); *Christopher P. v. Marcus*, 915 F.2d 794 (2d Cir. 1990). The significant conflict in the circuits created by this case makes it particularly worthy of this Court's review. This decision not only poses an immediate concern to public education in the states comprising the Fourth Circuit, but unless corrected by this Court, it also will likely foster confusion among school districts nationwide and may encourage parents in the Fourth Circuit and elsewhere to place procedural form over substance—not only with respect to "location" and "placement" issues but also with other issues as well where, heretofore, technical procedural violations were not viewed as a denial of substantive FAPE.

CONCLUSION

For the foregoing reasons, the School Board's petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 07-541

IN THE

Supreme Court of the United States

ALEXANDRIA CITY SCHOOL BOARD,

Petitioner,

v.

A.K., A MINOR BY HIS PARENTS AND NEXT FRIENDS J.K. AND E.S.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d)(1)(A)(i)(VII)(2004) ("IDEA") requires school districts to specify a particular school at which the IEP is to be performed.

II. Whether a substantive defect within an individual education plan results in a denial of a free and appropriate public education under the IDEA.

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SUMMARY OF THE ARGUMENT

The Petitioners urge this Court to grant certiorari based on a representation that the Fourth Circuit's decision conflicts directly with established authority from other Circuits and from the Fourth Circuit itself. They seek to have this Court reach this conclusion by misstating the majority holding and the facts of this case. The Fourth Circuit properly held that the Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d)(1)(A)(i)(VII)(2004) requires school districts to specify a particular school at which the IEP is to be performed. The Fourth Circuit further held that the failure to comply with this provision of the IDEA is a substantive violation. The conclusions reached by the Fourth Circuit are consistent with the precedent of the Fourth Circuit as well as the other circuits who have reviewed the issue in the case at bar. Because the Fourth Circuit's holding is consistent with the intent of Congress and the stated goals of the Individuals with Disabilities Education Act, the Petition for Writ of Certiorari should be denied.

PROCEDURAL HISTORY

This case was initiated when A.K.'s Parents sought a due process hearing pursuant to the IDEA against Alexandria City Public Schools (hereinafter, "ACPS" or "School Board"). On September 13, 14 and 16, 2004, a three day hearing was held to address the Parents' allegations that the proposed IEP violated the IDEA both substantively and procedurally. At the conclusion of the evidence, the Hearing Officer provided a written opinion. However, the writing failed to address the issues raised by the Parents and simply concluded that "the fact that [ ] did

not specify a particular private day program suggest to me that [ ] wanted to give the parents as much flexibility as possible." (App. 79(a)). The Hearing Officer's conclusion simply left the Parents legitimate questions unanswered. As a result, on March 1, 2005, the Parents sought an appeal to the U.S. District Court for the Eastern District of Virginia, pursuant to 20 U.S.C. § 1415(i)(2), alleging that the Hearing Officer failed to make the required findings of fact and address whether the IEP and the proposed placements met the requirement of a free and appropriate public education.

As determined by the Fourth Circuit Court of Appeals, the Trial Court also failed to apply the substantive and procedural mandates of the IDEA. Rather than require strict adherence to the procedural requirements of 20 U.S.C. § 1415, the Trial Court simply dismissed the procedural violations. Specifically, the Trial Court disregarded the procedures of the IDEA and the interpretative case law related to written notice. First the Trial Court determined that the "[p]arents knew or should have known" that a private day placement was being considered." (*A.K. ex rel J.K. v. Alexandria City School Board*, 409 F. Supp. 2d. 689, 693 (E.D. Va. 2005), 2005 U.S. Dist. Lexis 38392, App. 39(a)).[1] Additionally, the Trial Court determined that a level of placement was sufficient to meet the writing requirements of the IDEA despite the case law to the contrary. Finally, the Trial Court improperly adopted the Hearing Officer's determinations and held that "it is not

1. The record was clear that the Parents repeatedly requested information concerning what placements were being considered but ACPS failed to provide it either orally or in writing. (J.A. at 150, 965 (Dr. Kling), 1123, 1133 (E. Sullivan)).

necessary for the IEP to presume what transitional problems A.K. may encounter, then describe what services will be provided to combat them." (409 F. Supp. 2d. 694, App. 41(a)). In adopting the Hearing Officer's findings, the Court determined that anticipating a child's needs was not a requirement of the IEP. This stands in direct conflict with 20 U.S.C. § 1414(d)(4)(A)(i-ii)). The effect of the Trial Court's erroneous conclusion was to require that the Parents of a handicapped child would have the primary burden of identifying a school for their child.

The Fourth Circuit Court of Appeals, properly concluded that "[i]n finding that ACPS offered A.K. a FAPE, the district court erroneously relied on the premise that ACPS made a placement offer both at the Phillips School and the Kellar School." (1484 F.3d 681-682, App. 14(a)). Building on a proper analysis of the facts, the Fourth Circuit Court of Appeals concluded that the procedural requirements of the IDEA must be strictly enforced as determined by the Supreme Court. (See, *Rowley*, 458 U.S. 176, 205). The Fourth Circuit went on to conclude that the Trial Court's application of the law to the facts was clearly erroneous because the Judge incorrectly determined that ACPS did not have to adhere to the procedures in 20 U.S.C. § 1415 and allowed ACPS to abdicate its responsibility to make a specific offer. The Fourth Circuit Court of Appeals was the first tribunal to properly analyze the facts of the case and require the School District take the final steps of the IEP process and clearly identify an appropriate school placement.

The Fourth Circuit Court of Appeals opinion sets forth the relevant portions of the IDEA, the

implementing regulations, and the pertinent case law. The panel meticulously reviewed the law and the facts and properly concluded that ACPS actions did not comply with the IDEA. The Court denied the Petitioner's request for Rehearing or Rehearing En Banc with only one Judge dissenting. Every Judge, including the sole dissenter, agreed that the School Board did not comply with the IDEA.[2]

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION DOES NOT CREATE A SPLIT AMONG THE CIRCUITS.

A. The Majority Decision Properly Reviewed and Analyzed Prior Case Law and Applied it to the Facts of this Case.

The Petitioner represents that the Fourth Circuit's decision cannot be reconciled with prior case law. However, the Panel reviewed the precedential cases and properly applied them to the facts of this case. ACPS argues that the panel's decision is inconsistent with prior discussions of educational placements in the Fourth Circuit. (Petition for Certiorari (hereinafter, "Petition"), pg.14). ACPS reaches this conclusion by interchanging

2. Judge Gregory stated in his dissent to the denial of the request for rehearing that "[t]he school district did violate the IDEA — the law requires that an IEP identify the anticipated, frequency, duration, and location for the provision of educational services, and A.K.'s IEP specifies no location." *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 497 F.3d. 409, 409, 2007 U.S. App. Lexis 17925, (reh'g denied, (4th Cir. 2007)(Gregory, J., dissenting from rehearing en banc) App. 47(a) - 48(a)).

the terms educational placement and location. Both the majority and the dissent rejected this analysis. The panel majority discusses this issue in great length and reasoned in the A.W. case that:

> We held that the term educational placement as used in the stay-put provision refers to the overall educational environment rather than the precise location in which the disabled student is educated. We nevertheless observed that a change in location at which special education services are provided causes a change in "educational placement" if the location change results in a dilution of the quality of a student's education or a departure from the students [least restrictive environment] compliant setting. (484 F3d. 680, App. 11(a), (*citing, A.W. ex rel Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674 (4th Cir. 2004) (internal quotes omitted)).

The Court goes on to reason that "in light of the fact that the school at which special education services are expected to be provided can determine the appropriateness of an educational plan, it stands to reason that it can be a critical element for the IEP to address." (*A.K. ex rel J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 680, (4th Cir. 2007) , App. 12(a)). Even the dissent supports the majority opinions analysis that educational placement is not to be used interchangeably with location. Judge Gregory concluded that: "[t]he statue does not define *location* as it is used in 20 U.S.C. § 1414(d)(1)(A)(i)(VII)(Supp. 2004), but the term must refer to something other than an educational placement." (484 F3d. 683, App. 21(a)). The terms educational

placement and location are contained in different provisions of the IDEA. These sections have separate and distinct purposes and therefore the Petitioner's attempt to equate them is improper. The Court properly analyzes and applies the precedent from the prior Fourth Circuit cases to the requirements set forth in the IDEA.

B. The Majority Holding is Consistent with the IDEA and the Case Law.

ACPS argues that the majority holding conflicts with decisions from other courts of appeals. ACPS goes on to argue that the reliance by the Fourth Circuit on two Sixth Circuit opinions was improper. ACPS distinguishes these cases by asserting that the school systems failed to set forth an educational placement as opposed to a location. This distinction is without merit and is not supported by a proper reading of the cases. ACPS bases this argument on the premise that the Fourth Circuit Decision would require every IEP to name a particular school. (See, section III below). This simply is not what the Fourth Circuit required. The cases relied on by the panel majority are in fact directly on point. In *Glendale*, the court examined a case where several school placements were offered. The Court held that:

> A school district cannot abdicate its responsibility to make a specific offer allowing a parent to choose from among several programs presented as formal offers. After discussing the advantages and disadvantages of various programs that might serve the needs of a particular child, the school district must take the final step and clearly identify

> an appropriate placement from a wide range of possibilities. It was the District's responsibility to use its expertise to decide which program was best suited for [the student"s] needs. *Glendale Unified Sch. Dist. v. Talmar Almasi*, 12º F. Supp. 2d 1093, 1107, U.S. Dist. Lexis 17815 (9th Cir. 2000)).

In reaching this conclusion, the *Glendale* Court noted that offering a variety of placements puts an undue burden on a parent to eliminate potentially inappropriate placements, and makes it more difficult for a parent to decide whether to accept or challenge the school district's offer." *Glendale*, 122 F. Supp. 2d 1107. This case is directly on point and consistent with the requirements and the purpose of the IDEA.

Likewise, *Knable v. Bexley City School Dist.*, 238 F.3d 755 (6th Cir. 2001), relied on by the majority, is on point. In fact, the *Knable* case applies a common legal principle to the IDEA. Specifically, the *Knable* Court noted that "as an initial matter, we note that we must limit our evaluation of [the] proposed IEP to the terms of the document itself, as presented in writing to the [parents]." (*Knable*, at 768). The *Union* case is equally as relevant and ACPS' attempt to distinguish it as transparent. In *Union*, the School District failed to make a formal specific written placement offer. (*Union Sch. Dist. v. Smith*, 15 F. 3d 1519, 1994 US. App. Lexis 1479 (9th Cir. 1994)). The *Union* Court noted that the Supreme Court placed great importance on the procedural requirements of the IDEA and held that:

> We find that this formal [writing] requirement has an important purpose that is not merely

> technical and we therefore believe it should be enforced rigorously. The requirement of a formal written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement if any. Furthermore, a formal specific placement offer from a school district will greatly assist the parents in "complaints with respect to any matter relating to the . . . educational placement of the child." *Union*, 15 F.3d at 1526.

In an attempt to create a split among the circuits, the Petitioner relies on several cases which they argue "have consistently interpreted 'location" to be the location of services within an educational program, rather than location of the educational program itself." (Petition, pg. 19). Each of the cases cited by the Petitioners are distinguishable from the case at bar. Specifically, *Leonard v. McKenzie*, 869 F.2d. 1558, (D.C. Cir. 1989), *Weil v. Board of Elementary and Secondary Educ.*, 931 F.2d 1069 (5th Cir. 1991), *Christopher P. v. Marcus*, 915 F.2d. 794 (2nd Cir. 1990), and *Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS79) v. New York City Board of Ed.*, 629 F. 2d. 751 (2nd Cir. 1980)(cert. denied), 449 U.S. 1078 (1981) **are all cases decided prior to the 1997 amendments** to the IDEA. This is material because the 1997 amendments added the requirement that the location be identified on an IEP. This is the precise issue which is before the court. Therefore, these cases have no relevance on the question before the court.

The two reported post-1997 IDEA amendment cases that are mentioned by the Petitioners are not on point. In these cases, the courts were looking at different provisions of the IDEA all together.[3] In *John M. v. Board of Educ. Of Evanston Township*, 2007 U.S. App. LEXIS 22146 (7th Cir. 2007), the Court of Appeals examined 20 U.S.C. § 1415(j) in terms of the stay-put provision. In that case, the parents were fully informed of the location and identity of the school being proposed so the issue is distinctly different. Since 20 U.S.C. § 1415(j) and 20 U.S.C. § 1414(d)(1)(A)(i)(VII) have separate purposes and use different language the Petitioner's reliance on the cases interpreting the stay-put provision are inapposite to the question presented here. In fact the Circuits that have examined the terms location and educational placement have in fact determined that they have separate and distinct meanings. The *A.W.* case, which is discussed at length above, and by Fourth Circuit, notes that the terms are not interchangeable. Even Judge Gregory in his dissent agrees that the terms are not to be interpreted the same.

Unlike the cases relied on by the Fourth Circuit Court of Appeals, the cases cited by ACPS are not directly on point to the issue before the Court. There simply is not a split in the circuits regarding the requirement that 20 U.S.C. § 1414(d)(1)(A)(i)(VII) requires that a school district specify a particular school as the location where the IEP is to be implemented. When other circuits have examined the precise issue as raised in the case at bar, they have reached the same conclusions.

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3. The *Jennings v. Fairfax County School Board*, 35 IDELR 158 (E.D. Va. 2001) aff'd, 2002 U.S. App. LEXIS 14372 (4th Cir. 2002) case was an unpublished opinion limited to the facts of that case.

II. THE PETITION FOR WRIT OF CERTIORARI INCORRECTLY STATES THE HOLDING OF THE FOURTH CIRCUIT.

A. The Petitioner Mischaracterizes the Holding in the Case at Bar.

1. All Three Panel Members Held that ACPS' Actions Did Not Comply with the Requirements of the IDEA.

It is critical to note that all three judges, even Judge Gregory who wrote the dissent, acknowledge that ACPS' actions did not comply with the requirements of the IDEA.[4] The Petitioner's request for a rehearing or rehearing en banc failed to produce a single vote from the remaining members of the Fourth Circuit Court of Appeals which felt that ACPS had complied with the IDEA.

2. The Majority's Decision Properly Applied the Law to the Facts of the Case.

The Fourth Circuit held that ACPS failed to offer a free and appropriate education to A.K. because the individual education plan did not identify a particular school where A.K. would be educated. (484 F.3d 672, 681, App. 13(a)). The panel majority began their analysis by reviewing who had the burden of proof and what standard of review

4. See, majority opinion: "ACPS failed to offer FAPE because the IEP did not identify a particular school at which [the IEP] anticipated that A.K. would be educated." 497 F.3d 409, 21(a)). See also, dissent: "[t]he IEP that ACPS prepared for A.K. was flawed — it did not include the location at which A.K. would receive special educational services." 484 F.3d. 683, App. 20(a)).

was to be applied. Acknowledging that the Parents bore the burden of proof, the Court goes on to state that factual findings are to be reviewed under a clear error test unless it is based on an incorrect application of the law, as in the case at bar.

In reviewing the applicable provisions of the IDEA and the subsequent case law, the Court determined that identifying a location **can** be a factor to determine if a free and appropriate public education was offered. In support of this holding, the Court reviewed the wording of 20 U.S.C. § 1414(d)(1)(A)(i)(VII) and the Senate Report concerning the 1997 amendments to the IDEA. (484 F.3d 684, App. 11(a)). Specifically, the Court noted that the requirement that a location be identified was added to the provision because location "influences decisions about the nature and amount of these services and when they should be reported." (484 F.3d 684, App. 11(a), *quoting*, S. Rep. No. 105-17, at 21 (1997)).

The holding was also supported by the prior case law of the Fourth Circuit which the panel analyzed. The Court stated that "in light of the fact that the school at which special education services are expected to be provided can determine the appropriateness of an education plan, it stands to reason that it can be a critical element for the IEP to address." (484 F3d. 680, App. 12(a)). The Fourth Circuit reached the only logical conclusion based on the facts of this case: the school system must identify a particular school which can implement the IEP. Otherwise, the school could offer "utopia" to every student without the responsibility of insuring that it exists. Under the IDEA, the school has the responsibility to educate the student based on the individual education plan. Inherent in that responsibility is the obligation to identify the school where that IEP can be implemented.

3. ACPS' Petition Misstates the Majority Holding.

ACPS seeks to have this Court hear this case based on two premises: 1) the decision is in conflict with other case law 2) the precedent which is established could be costly to school systems. Neither of these two premises is consistent with a proper reading of the majority's decision. ACPS argues that:

> The Court of Appeals' decision that an IEP must not only describe the features of the special education program, but include the name of a specific school is not only applicable to a narrow subset of cases under the IDEA . . . On its face, [the Fourth Circuit decision], would invalidate as a matter of law most if not all of the hundreds of thousands of IEPs in the Fourth Circuit alone. (Petition, pg. 12)

This statement upon which the Petition For Certiorari is premised, mischaracterizes the Court's holding. Notwithstanding ACPS' assertions to the contrary, the panel does not create a bright line test that the IDEA requires all individual education plans to identify a specific school in all cases. The Court articulated the narrow application of their decision:

> **Here**, we hold as a matter of law that because it failed to identify a particular school, the IEP was not reasonably calculated to enable A.K. to receive educational benefit. *See, Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034 (1982). Indeed this case presents an

> excellent example of the circumstances under which inclusion of a particular school in the IEP **can** be determinative of whether a free and appropriate public education has been offered. (484 F.3d 681, App. 13(a))(emphasis added).

The Fourth Circuit made their holding very clear: not every IEP requires the school system to identify a particular location. The court goes on to state:

> We emphasize that we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided. There is no reason for us to frame the issue so broadly. (484 F3d. 682, App. 15(a)).

Even the dissent acknowledges that the holding of the Fourth Circuit does not dictate what the School Board asserts. In his dissent, Judge Gregory notes that "[m]ore than once the majority acknowledges that the failure to identify the location of the provision of special education services on a student's IEP need not always result in the denial of FAPE." (484 F3d. 684, App. 22(a)). ACPS' unfounded assertion that hundreds of thousands of IEP in the Fourth Circuit alone will become invalid as a result of this decision is a material misstatement of the holding.

4. The Rule ACSB Advocates Would Frustrate Congress' Intent to Provide Children with Disabilities a Free Appropriate Public Education.

ACPS argues that their failure to identify a location where the IEP could be implemented was a "technical procedural misstep" and therefore should be subject to a harmless error test. However, after a careful review of the facts the majority opinion rejected this analysis because the result of the process, as advocated by the Petitioner, would be to frustrate the intent of the IDEA. The Court concluded that the error which occurred was not procedural in nature but rather substantive. The Court stated "[b]ecause we view this claim as an alleged deficiency in what ACPS was offering rather than in the procedure by which the offer was developed or conveyed, we consider the alleged violation to be substantive." (484 F3d. 679, FN 7 citing, *Knable ex rel Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 767-70 (6th Cir. 2000)). The Court went on to expressly reject that a harmless error test should be applied in this context and stated:

> The dissent appears to assert that the failure of the IEP to identify a particular school was a procedural violation subject to harmlessness analysis rather than a substantive violation because the parents would have sent A.K. to Riverview no matter what ACPS offered. See post, at 17-20. This argument conflates the question of whether a violation is merely procedural - and thus subject to harmlessness analysis - with the harmlessness analysis itself. Under the dissent's logic, even a complete

> failure by a school district to offer - formally or informally - any alternative to the parents' favored educational plan would amount to only a harmless procedural error if the district could establish that the parents would not have been receptive to the district's offer." (484 F3d. 679, App. 17(a)-18(a)).

The line between the substantive and procedural errors in this case did not turn on a legal question of how to classify the violation, but rather on a fact-bound question of notice. Furthermore, whether the facts of this case were sufficient to put the parents on notice is not fairly encompassed in the question presented in the Petition nor was it raised below which makes it unworthy of this Court's review. The majority properly concluded that the violation of the IDEA that occurred in this case was substantive. Furthermore, the majority carefully examined the argument set forth by ACPS, which were also advanced by the dissent, and determined it to be illogical. The result of ACPS actions was to require the Parents to identify and locate a private day school in the area existed which would be a satisfactory fit. The Court correctly held that this was not the way the IDEA was designed to work. It is incumbent on the School District to utilize its expertise to clearly identify an appropriate placement from the range of possibilities.[5]

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5. This analysis is particularly pertinent in this case. The reason the Parents were unable to determine at the June 9, 2004 meeting if they should sign the IEP, was because not one person at the IEP meeting could determine if any such placement actually existed which could implement the IEP.

ACPS' argument that the failure to identify a particular school was a technical procedural error which did not substantively deprive A.K. of any educational opportunity is without evidentiary support. Furthermore, the Petitioner's reliance on *White ex rel White v. Acension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003) and *C.J.N. v. Minneapolis Public Schools*, 323 F.3d 630 (8th Cir. 2002) is misplaced. (Petition, pg. 29). Pursuant to 20 U.S.C. § 1415(f)(3)(E), a procedural violation which impedes the child's right to a free and appropriate public education, or significantly impedes the parent's opportunity to participate in the decision making process for their child's education or causes a deprivation of educational benefits results in a denial of a free and appropriate education. (*See, Speilberg v. Henrico County Public Sch. et. al.*, 853 F.2d 256, 1988 U.S. App. Lexis 10792 (4th Cir. 1988)(citing, *Hall v. Vance Cty. Bd. Of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985)). The *White* court was examining the parent's complaint that they had not been provided the opportunity to have input into the location determination. The location and identity of the school was known to everyone. The quote relied on by the Petitioners was merely dicta and not dispositive of the case. The *CJN* court was examining the stay put provision of the IDEA and the brief comment quoted by the Petitioner's has no relevance in the case at bar. The determination that the violation was substantive not procedural in the case at bar does not conflict with precedent from the Fourth Circuit nor any other circuit.

ACPS' attempt to bring this court into an entangled factual dispute is unnecessary. Even if the error in this case was procedural in nature, the result was a denial of a free and appropriate public education. In the case-at-

bar, both the student's education and the parents rights were compromised. First, A.K. was scheduled to begin summer school on July 1, 2004 but no schools were even contacted by ACPS until July 9, 2004. Therefore, A.K.'s rights to a free and appropriate public education were impeded. Second, the Parents' rights were also significantly infringed upon. The IEP chairperson, without consultation with the Parents, determined what schools to apply to for A.K. and thus she undermined the Parents' role completely. The Parents were only notified of which schools were being considered when they were carbon copied on correspondence to the specific schools. Finally, the fact that a school was not identified which could implement the IEP for A.K. was by very definition a deprivation of educational benefit. A.K. could not have received an education because no school existed that could implement the IEP. The Fourth Circuit Court of Appeals properly found a substantive error occurred in this case. However, even assuming arguendo that the error was procedural in nature, the result under the IDEA was that A.K. was denied a free and appropriate public education.

5. The Majority's Decision Does Not Expose Local School Systems to Substantial Monetary Claims.

ACPS argues in their Petition that the Court should hear this case because the case could potentially invalidate every IEP in the Circuit. ACPS also asserts that the decision is at odds with consistent regulatory guideline. (Petition, pg. 25). ACPS' argument is based on a misapplication of the majority holding and thus is a thinly veiled attempt to obtain a Writ of Certiorari. The

majority opinion was very clear that its holding is limited to only very narrow factual situations. The issues involved certainly do not apply to every IEP in the Circuit. The Court's analysis is limited to cases where location is a key factor in determining if a school program exists which can implement the IEP.

ACPS asserts that this Court should look to the Department of Education to interpret the IDEA. However, the Court's only defer to the regulatory agency when there is an ambiguity. Location is a clear concise term which is not subject to more than one interpretation. ACPS tries to create an ambiguity by interchanging the terms "location" and "educational placement." However, the terms have separate and distinct meanings. Despite ACPS' assertions to the contrary, the term "location" is discussed in the legislative history. The majority decision specifically reviewed the Senate Report concerning the 1997 amendments to the IDEA which added the requirement that the location be identified. (484 F3d. 680, App. 11(a)). As noted by the majority, location is a key factor because the location influences decisions about the nature and amount of the services and when they should be provided. (484 F3d. 680, App. 11(a)). The Fourth Circuit properly reviewed the intended meaning of the word location and interpreted the meaning based on the intent Congress prescribed for it in amending the IDEA.

The holding of the majority will not expose local school systems to potential monetary claims. In fact the opposite is true. As noted by the *Knable* Court and the *Union* Court in discussing the importance of the formal written placement offers, the requirement is not merely

technical, but rather serves the important purpose of creating a clear record of what was offered to the Parents. The written offer helps to eliminate factual disputes between the School District and the Parents about the proposed placement.

ACPS asserts that the Court of Appeals "demonstrated little understanding of the way the IEP and placement process actually does work." (Petition, pg. 20) They further argue that "the effect of the Court of Appeals's decision here, however, is to encourage parents not to participate fully in IDEA's IEP process in order to identify a less restrictive placement." (Petition, pg. 21). There is simply no factual basis to this argument. First, the IEP and placement process only works when the School identifies an appropriate placement for a student with a disability to be educated. As noted by the majority, in some limited factual situations, this requires the identification of a particular school location. If this step is not completed then the entire IEP process falls short of the goal of the IDEA: to provide a disabled student with a free and appropriate public education. The Fourth Circuit's in depth understanding of the IEP process is woven through out their opinion. The Court noted "we emphasize that the IEP-development process is a co-operative one. Thus, if the School District identifies several schools during the process that it believes would serve the needs of the child, parents will have the opportunity to voice their preferences before the IEP is finalized." (484 F3d. 681, FN 10, App. 19(a)). The process as guaranteed by the IDEA can only be satisfied by the analysis presented by the majority opinion.

Furthermore, when a school location is identified by the School Board, the only litigation that is necessary is to determine if the proposed school meets the requirements of the IDEA. The process as outlined by ACPS would require that the litigation cover whether **any** private day school could meet the needs of the student. The process as outlined by the Fourth Circuit insulates the school from burdensome litigation by creating a clear concise record.

The Court of Appeals decision also promotes the cooperative process of the IDEA resulting in a placement in the least restrictive environment. When the IEP team is required to complete the process, as contemplated in the IDEA, the meeting culminates with a discussion about placement. The IEP team, including the Parents, would have the ability to discuss all of the potential placements available along a continuum of services. Once all of the options were known to the Parents, and all members of the IEP team, the process would allow for a decision of which environment could provide the student with a free and appropriate public education while ensuring that the student was in the least restrictive environment. The Fourth Circuit, relying on the *Glendale* case, concluded that after "discussing the advantages and disadvantages of various programs that might serve the needs of a particular child it is incumbent on the school district to utilize its expertise to clearly identify an appropriate placement from the range of possibilities." (484 F3d. 681, (citing, *Glendale*, 122 F.Supp. 2d at 1107 (internal quotations omitted), App. 14(a)). As noted by the Fourth Circuit, the identity of a school is a key element in determining if a placement is appropriate, if the Parents are not informed of what

potential placements are available this discussion cannot take place.[6] It is the responsibility of the School, not the parents, to utilize their expertise in the area of education to identify potential placements. The result of the Fourth Circuit's decision is to promote the cooperation of the Parents and the School personnel in finalizing a placement for the student.

The Fourth Circuit Court of Appeals decision properly applied the IDEA and the case law to the facts of the case. The decision results in insulating the school system from costly litigation by limiting factual disputes and allowing the Parents to participate in the IEP process in the cooperative manner as outlined in the IDEA.

III. THE QUESTIONS PRESENTED BY THE PETITIONER ARE PREMISED ON AN INCORRECT STATEMENT OF THE RECORD.

A. ACPS Did Not Make an Offer of Placement of Two Schools.

In their petition for writ of certiorari, the Petitioner provides a Statement of Facts. However, the representations of the Petitioner are not consistent with the evidence or the findings of the Fourth Circuit Court of Appeals. A critical element to this case revolves around what, if any, schools were offered by ACPS as

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6. One factor considered in the least restrictive environment is the proximity to the student's home. Since the school system, not the parents, have access to the availability of programs they must disclose this information to ensure that the student can be placed in a program which is closest to their home.

placement options. In their Statement of Facts, ACPS asserts: "During the final IEP meeting, School Board staff suggested to the Parents two specific private day programs that could implement the IEP: Phillips School and Kellar School." (Petition, pg. 4). However, ACPS' witness and IEP chair person, Susie Sullivan, testified that she gave the Phillips School and the Kellar Center as **examples** of private day placements that were **mentioned**. (J.A. at 966 (Dr. Kling), 1134-1135 (E. Sullivan)). ACPS is now trying to re-characterize the evidence to say that a mention or an example constitutes an offer of placement. Furthermore, there is nothing in the record which supports ACPS' proposition that the school asked the Parents at the IEP meeting to consider the schools as placements. The notion that ACPS made an offer of placement to the Phillips School and the Kellar Center was expressly examined and rejected by the Fourth Circuit Court of Appeals. Specifically, the Court of Appeals held "with the IEP not identifying any particular school (because the IEP team had not discussed the issue) the Parents were left to fend for themselves to determine whether any private day school in their area — including the five ACPS applied to would be a satisfactory fit." *A.K.*, 484 F.3d 672, 681, (4th Cir. 2007), App. 14(a).

Further compounding ACPS' misstatement is the assertion that A.K.'s Parents refused to consider any placement recommendations. The Parents did not reject any school at the IEP meeting. A.K.'s mother testified that she had in fact undertaken an extensive review of the local private day schools in the past and felt they could not provide A.K. a free and appropriate public

education. (J.A. 1124, 1135).[7] Her comment regarding the private day schools was made in the context of an IEP meeting which is a cooperative process — it was not an immediate rejection. A.K.'s Parents continued to try to find a private day placement and **A.K.'s mother visited both the Phillips School and the Kellar Center again after the IEP meeting in hopes that they would provide an appropriate placement for her son.** (J.A. 1153). Nothing which the Parents said or did evidences that they rejected either school at the IEP meeting. The majority opinion carefully evaluated the evidence and concluded:

> Although Sullivan mentioned during an IEP meeting that Kellar and Phillips would be possible placements, the IEP team had never considered whether these particular schools would be able to satisfy A.K.'s specialized needs. (484 F.3d 681, App. 13(a)).) ... Especially in this case, in which the parents had tried in vain to find a local private day school that could meet A.K.'s specialized needs, the offer of an unspecified "private day school" was essentially no offer at all. (484 F.3d 682, App. 13(a)).

The actual "offer" of placements relied upon by ACPS occurred for the first time at due process hearing.[8] The

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7. J.A. represents citations to the Joint Appendix filed in the Court of Appeals.

8. A.K.'s father testified that the very first time anyone from ACPS discussed specific private day placements with them was at the due process hearing. (J.A. at 1097).

evidence demonstrates that the Parents and ACPS' witnesses acknowledge that A.K.'s Parents were not offered these two programs at the IEP meeting. (J.A. 1296, 1298 (Hearing Officer's findings)). ACPS' counsel also acknowledged this in his opening statement. (J.A. 480). The "offer" was merely a statement by ACPS' counsel that two schools could implement A.K.'s IEP. (J.A.1097 (Dr. Kling)).

What the record demonstrates is that Susie Sullivan directed the IEP team to make a recommendation for a private day placement as the level of service. This is evidenced by ACPS' own witnesses. Ms. Cohen, an autism resource specialist for ACPS, testified that at the time she made the recommendation of a private day program, she did not have any knowledge about any specific day programs being considered or any teacher to student ratios at these schools; however, she voted that a private day school was the appropriate placement. (484 F.3d 681, 13(a), J.A. 567 C. Cohen)).[9] Ms. Cohen was simply doing what her superior told her to do.

The Parents adamantly disagree with ACPS' statement that all of the "parties agreed that [the IEP] fully and accurately described A.K.'s present level of performance." (Petition, pg. 3). The IEP team ignored a critical element of the placement decision. The Parents sought the advice of an outside educational expert to help them determine the factors that would need to be considered in determining the educational setting where A.K. could make educational progress. The Parents did this in accordance with the mandates of the IEP and

9. All of the experts agreed that the student to teacher ratio was critical for A.K.'s success.

presented a written report and requested that it be made part of the IEP. Not only did the IEP chair person refuse to make it part of the IEP, she acknowledged that she did not read the expert's recommendations prior to determining that a private day placement could meet A.K.'s unique individual needs. (J.A. at 648, 650-651, 1065 (S. Sullivan) 1154, 1157 (E. Sullivan))

The evidence in this case is very clear that no offer of specific schools were made at the IEP meeting. Furthermore, it is undisputed that after the IEP meeting ACPS sent out applications to five different schools seeking a placement for A.K..[10] After a careful review of the record, the panel majority found:

> That ACPS proceeded to submit applications on A.K.'s behalf to five different private day schools, at least two of which indicated, without even meeting A.K., that they could not satisfy his specialized needs, only highlights the need for the IEP team and the IEP to identify a particular school. (484 F.3d 681, App. 14(a)).

If an offer of placement was made to the Keller Center and the Phillips School, there would have been no need

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10. Three of the schools rejected him out right without even meeting with him. (J.A. 436-437, 1151 (E. Sullivan)). Both the Lab School and the Oakmount School wrote to Susie Sullivan and stated that after reviewing the information forwarded by ACPS they could not meet A.K.'s unique needs. (J.A 436, 437). By sending out the applications to schools that were never even discussed with the parents, the critical element of parental input was disregarded.

to apply to other schools. ACPS did not make an offer of placement of two schools. Therefore, ACPS' entire argument is based on a faulty premise.

B. The Parents' Actions in this Case were Exemplary.

ACPS' attempts to try to discredit the Parents' actions in this case in an effort to relieve the school system of the responsibility to identify a placement for a disabled student under the IDEA. Specifically, ACPS tries to blame the Parents for the failed IEP process by stating that "without engaging in the interview process, on July 9, 2005, the Parents filed for an administrative hearing under IDEA, rejecting the School Board's proposal for a private day placement." (Petition, pg. 5). ACPS additionally tries to fault the Parents by continually referencing that A.K. was not brought to the Phillips School or the Kellar Center for an interview. These allegations are material misrepresentations.

The record is clear in this case that A.K.'s Parents went above and beyond what is required of any parent. First, in an effort to try to keep A.K. in the public school setting, A.K.'s Parents paid for staff training, consistently worked with school staff, and sought out school support so A.K. could attend his local public school. (J.A.1118-1121 (E. Sullivan)). In the past when ACPS failed to identify the aide required by A.K.'s IEP in time for the school year to begin, A.K.'s mother located and paid an aide until one could be hired by ACPS. (J.A. 1119 (E. Sullivan)). It was not until A.K. was repeatedly assaulted in the public school that the Parents accepted ACPS' recommendation to remove him from

that setting. It was at this point that A.K.'s Parents undertook an extensive review of local private day placements. (J.A. 957-959 (Dr. Kling) 1124-1127 (E. Sullivan)). The IEP process was long and arduous and lacked good faith participation from the school system. Rather than applaud the tremendous effort of the Parents of a disabled child, ACPS turns around and states that the parents have refused to cooperate. This is not only misleading, it is disingenuous.

ACPS also alleges that A.K.'s Parents were at fault because they did not bring A.K. on numerous school visits.[11] (Petition, pg. 5). They fail to acknowledge that A.K.'s mother promptly visited, and in the case of the Phillips School, revisited the schools. ACPS portrays these school visits as necessary visits which A.K. failed to attend. However, no where in the record is there any evidence that A.K.'s mother was ever advised that A.K. could attend the visits. The **un-rebutted** evidence was that she was never asked to bring A.K. to the schools at the time of her visits. (J.A. 1151 (E. Sullivan)). Furthermore, A.K. was in school in Massachutes. The IDEA process was not envisioned to have Parents of a

11. ACPS takes the position that A.K. should have visited multiple schools before it was even determined if a placement was available for him. This shows a fundamental misunderstanding of this student and his disability. A.K.'s mother looked at the potential schools and in consultation with multiple experts determined that the placements would not be able to provide A.K. with a free and appropriate public education. In fact, the professional opinions of individuals whom knew A.K., was that the placement at either the Phillips Center or the Kellar Center would cause actual harm to A.K. with potential long term negative consequences. (484 F.3d 678-679, App. 8a, (see also, J.A. 921(Cheryl Wietz) 1008, 1020 (Dr. Stixrud)).

disabled child go from school to school in hopes that a particular placement could educate their son only later to be told their visits did not measure up to the expectations of the school system. As noted by the majority: "[t]his is not how the IDEA was designed to work." (484 F.3d 681, App. 14(a)).

ACPS also faults A.K.'s Parents because they made a down payment for Riverview, in April.[12] A.K.'s Parents were placed in a no win situation due to ACPS' inaction. The Parents sought information from ACPS as early as January 2004, regarding where A.K. would attend school the following year. After repeated requests from the Parents to ACPS to determine and discuss potential placements, there was no indication that A.K. would not continue at Riverview.[13] (J.A.1219-1220 (S. Sullivan)). Therefore, when A.K.'s Parents were notified by the Riverview School that if they did not make a down payment A.K. would not be able to attend Riverview the next year, they made the down payment. The evidence,

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12. The Parents paid for the participation of the Riverview Staff and an attorney for over nine hours of IEP meetings. (J.A. 961 (Dr. Kling)). They continued to investigate placements in hopes of identifying a private day school locally. (J.A.1149-1153 (E. Sullivan)). If it was their intent for A.K. to attend the Riverview School all along, they would not have spent their time, money, and energy to participate in this long and difficult process. It is disingenuous for ACPS to now characterize the efforts of A.K.'s Parents as anything other than exemplary.

13. For the 2003-2004 school year the Parents were forced to file for due process because ACPS failed to identify an appropriate placement. Prior to the due process hearing, the parties settled the case and A.K. attended the Riverview School with partial funding from the School Board. (J.A. 466).

as determined by the Hearing Officer was that if A.K.'s Parents had not made the deposit, a spot would not have been reserved for him.

A.K.'s Parents were forced to file for due process because the services were scheduled to begin on July 1, 2004, and as of July 9, 2004, when the parent's filed for due process, no school placement had even been identified for A.K.. The IEP that was controlling A.K.'s education was meaningless because by the School Board's own admission they had no where to implement the IEP when it was due to start. It was not until after the IEP was scheduled to begin, that ACPS even sent applications out to five schools. This was egregious given the fact that the Parents sought to have other placements identified six months earlier. Throughout A.K.'s enrollment at Alexandria City Public Schools, A.K.'s Parents have acted in good faith and gone well above the requirements of the IDEA.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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